



**Nkabo v M’nyiruu (Civil Application E034 of 2024)
[2025] KECA 956 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KECA 956 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E034 OF 2024
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA
MAY 9, 2025**

BETWEEN

DINAH KAWIRA NKABO APPLICANT

AND

JULIA WANJA M’NYIRUU RESPONDENT

(An application for stay of execution against the Judgment of the Environment and Land Court at Meru (Nzili, J.) delivered on 20th March 2024 in ELC Case No. 53 of 2019)

RULING

1. Before the court is an application filed by way of a notice of motion dated 12th April 2024, under section 3A (1) & (2) of the [Appellate Jurisdiction Act](#) and rules 5(2)(b), 41, and 47 of the Court of Appeal Rules, seeking for a stay of execution.
2. The application is supported by the grounds on the face of it, and the applicant’s affidavit sworn on 12th April 2024, wherein it is stated that the applicant is the registered owner of two parcels of land, Abothuguchi/Katheri/5224 and Abothuguchi/ Katheri/5225, measuring approximately 1.619 hectares, and 0.399 hectares respectively, both of which originated from the applicant’s main title Abothuguchi/Katheri/969, approximately 1.903 hectares; that the impugned judgement has unlawfully deprived the applicant of the property stemming from a claim of an adverse possession by the respondent; the court (Nzili, J.) ordered the cancellation of the applicant’s proprietorship of the original Abothuguchi/Katheri/969 (which is in any event non-existent) within 60 days from 20th March 2024, along with any subdivisions arising from it, and vesting the property upon the respondent; the applicant has been farming on the said land to date; further there was no claim concerning the said two (2) subdivisions of parcel Abothuguchi/Katheri/969; the notice of appeal was promptly filed; and the letter requesting typed and certified copies of the proceedings, judgment, and decree sent to the Deputy Registrar of the trial court.



3. In his submissions dated the 29th of April 2024, learned counsel for the applicant rehashed the averments on the grounds of the application and the affidavit in support. In addition, counsel argued that there are arguable points as contained in the draft memorandum of appeal that include; whether the trial court could order for the cancellation of a non-existing title without a basis, and whether an order on adverse possession can arise in such a situation; further whether the trial court was right to order the applicant be evicted from the two parcels, yet the applicant has been farming on the same and there was no claim concerning the same.
4. On the nugatory aspect, learned counsel urged that unless the order is granted, the applicant will suffer irreparable harm. The respondent has no known source of income or assets and may dispose of the property to third parties or encumber it. Should this happen, the applicant's rights under Articles 40, 50(1), and 48 of *the Constitution* will have been taken away unlawfully.
5. In opposition, the respondent filed a replying affidavit sworn on 30th April 2024, where she deposed that the applicant caused the original title known as Abothuguchi/Katheri/969 to be subdivided in blatant disregard for court orders as the court (Mbugua, J.) had issued an order to maintain the status quo of the property on 30th September 2019, in the presence of both parties' counsel; the applicant cannot justly claim benefits from a clear violation of a valid court order, that the court (Nzili, J.) correctly applied the law and, based on the evidence presented, reached a fair conclusion regarding the matter; the respondent has no intention of disposing the suit property as she has lived in it since 1975; and has carried out substantive improvements; further she also has the right to enjoy the fruits of the judgment entered in her favour; the grant alluded by the applicant dates back to 7th February 2019; the applicant did not implement the same until the respondent filed her claim for adverse possession; the applicant, with malicious intent to undermine the respondent's claim, caused the suit property to be subdivided on 15th October 2019; she urged the court to dismiss the application.
6. The respondent did not file any submissions.
7. Rule 5(2)(b) of the Court of Appeal Rules provides that:
 - 5(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—
 - (b) in any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.
8. To succeed in an application under rule 5(2)(b), an applicant has to satisfy 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 and order of proceedings are not stayed.
9. In *Trust Bank Limited & Another vs. Investech Bank Limited & 3 Others* [2000] eKLR, this Court delineated its jurisdiction 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 of 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...”

10. 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. The draft memorandum of appeal annexed to the application shows that the applicant has raised several arguable points. We do not find them idle; they deserve to be ventilated on appeal.
11. On the second limb, the applicant has argued that the property will likely be alienated or encumbered. The respondent denied the allegation and stated that she has lived on the suit property, which the applicant equally claims. The applicant also claimed that the respondent has no known income or assets that would enable her to compensate the applicant in case of a successful appeal, which may render the appeal nugatory. The respondent was silent on this claim. Since both claim to be in possession and the respondent did not controvert that she cannot compensate likely loss in the event of a successful appeal, we find that the applicant has demonstrated the two necessary limbs. We allow the application.
12. Costs will abide by the outcome of the appeal.

DATED AND DELIVERED AT NYERI THIS 9TH DAY OF MAY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL ALI-ARONI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

