**Mugambi (Suing in a Personal Capacity and also as an Administrator of the Estate of the Late Julius Muringi Mugambi - Deceased) & 3 others v Hosea & 4 others (Civil Appeal (Application) E182 of 2024) [2025] KECA 998 (KLR) (2 May 2025) (Ruling)**

Neutral citation: [2025] KECA 998 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NYERI**

**CIVIL APPEAL (APPLICATION) E182 OF 2024**

**JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA**

**MAY 2, 2025**

**BETWEEN**

**PATRICK MWONGERA MUGAMBI (SUING IN A PERSONAL CAPACITY AND ALSO AS AN ADMINISTRATOR OF THE ESTATE OF THE LATE JULIUS MURINGI MUGAMBI - DECEASED) ..... 1ST APPELLANT**

**BEATRICE RIGIRI MURINGI (SUING BOTH IN A PERSONAL CAPACITY AND ALSO AS ADMINISTRATRIX OF THE ESTATE OF THE LATE JULIUS MURINGI MUGAMBI - DECEASED) ..... 2ND APPELLANT**

**ERIC KIOGORA MUGAMBI ..... 3RD APPELLANT**

**MARTIN KOOME MUGAMBI ..... 4TH APPELLANT**

**AND**

**KINYUA HOSEA ..... 1ST RESPONDENT**

**NTINYARI AGNES ..... 2ND RESPONDENT**

**JENNIFER KAIRIARI ..... 3RD RESPONDENT**

**PHINEAS MUTUMA NTARANGWI ..... 4TH RESPONDENT**

**LENNY KIRIMI NTARANGWAI ..... 5TH RESPONDENT**

***(Application for stay of execution from the Judgment and Decree of the Environment and Land Court of Kenya at Meru (Yano, J.) dated and delivered on 4th July 2024 in E.L.C. Case No. E003 of 2020)***

## RULING

1. The applicants, by a notice of motion dated 31st October 2024, brought under rule 5 (2)(b) of the Court of Appeal Rules, 2022, seek orders:Moot;Moot;that the respondents be restrained by orders of temporary injunction either by themselves, their agents, servants or assignees from trespassing upon encroaching on or otherwise interfering with the applicant's/appellant's peaceful occupation, possession and user of the disputed portion of the suit land measuring 0.0697 Ha or thereabouts as marked by K-apple fence including but not limited to the 2nd and 4th applicants dwelling houses and their rental houses thereon being the status quo obtaining as at the date of the impugned judgment and decree until the application herein is heard and determined and in the interim and ultimately until the main appeal is heard and determined.costs be provided for.

2. The grounds for the application are on the face of the application and in the affidavit of Patrick Mwongera Mugambi, the 1st applicant, of even date. He deposes that the applicants have lived on the land for many years and that they all have built their matrimonial homes within the disputed parcel of land. He deposed that the respondents attempted to put up a new fence without the assistance of a surveyor, which led to a dispute that led to the suit.

3. The application is opposed. The 1st respondent, in a replying affidavit dated 11th November 2024 challenges the propriety of the application urging; that the land the 1st applicant identifies leaves one wondering which Kei apple fence and house rentals are being referred to as the land in dispute has no such fence or rentals; that it has not been shown that the 2nd and 3rd applicants have given consent for the application to be brought on their behalf and that the suit land has since been sub-divided and individual titles in the names of the respondents issued.

4. We heard this application on the 26th November 2024, where learned counsel Mr. Mwenda Mwarania appeared for the applicants, whereas learned counsel Mr. Mark Ashaba was present for the respondents. Mr. Mwarania relied on his written submissions dated 3rd October 2024, the supporting affidavit dated 13th October 2024, and the supplementary affidavit dated 14th November 2024. Mr. Ashaba relied on the replying affidavit dated 11th November 2024 and the written submissions dated 20th November 2024. Both counsel briefly highlighted their submissions.

5. We have considered the application and the rival submissions of counsel to the parties. First and foremost, this Court's jurisdiction to stay the impugned judgment and decree is contingent on a notice of appeal being filed against the said judgment pursuant to Rule 77 of the Court of Appeal Rules. This requirement is prescribed by Rule 5 (2)(b) of the Rules and was confirmed by this Court in Halai & Another vs. Thornton & Turpin [1963] Ltd. [1990] KLR 365. We are satisfied that the application is competent as the applicants have demonstrated that they filed a notice of appeal dated 9th July 2024.

6. 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."

7. On arguability of the appeal, the applicant has annexed a memorandum of appeal dated 7th October 2024 which contains seven (7) grounds of appeal. What the counsel for the applicant urged was that the respondents were disturbing the status quo without involving the trial court, and that the eviction notice served upon the applicants was in violation of the section 152 A to H of the *Land Act*. In the supplementary affidavit sworn by the 1st applicant in response to the replying affidavit, the 1st applicant averred that he has the authority of the 2nd and 3rd applicants, which was given at the time of filing suit in the trial court. He also avers that the 2nd and 3rd applicants moved out of the land but not voluntarily.

8. Mr. Ashaba in his submissions urged that the matter has been in and out of court since the 1990's and that the case was resolved to finality in the impugned judgment; that the applicants were given three months to remove their structures on the respondents' side, and that the 2nd and 3rd respondents have since moved out. Counsel urged that it is impossible to revert to status quo ante judgment as it will mean pulling down fences and inviting the applicants back to the land.

9. On the principle of arguability, the applicants are supposed to demonstrate that they have an arguable appeal, and even just a single arguable ground, even if it may not succeed on appeal is sufficient. What has transpired is that the applicants were given three months to move their structures from the respondent's side of the land on 4th July 2024, to settle the boundary between the parties. It is shown that the 2nd and 3rd applicants moved out within the prescribed period. The 1st applicant has not demonstrated that he is still on the suit land and how he may be affected if the order sought is not granted. It, therefore, appears that the execution process of the decree of the superior court is on course and has been executed in part with the voluntary steps taken by the 2nd and 3rd applicants to move out as required. Even though the 1st applicant has denied the averment of the 1st respondent that the 2nd and 3rd applicants moved out voluntarily, we note that the two have not involved themselves in this application. Further, it is superfluous to argue at this stage whether their move was voluntary. Having vacated, there would be nothing to stay as the horse has bolted, so to speak. We are not satisfied that there is anything to stay or injunct. We are not satisfied that issuing the orders sought may not be tantamount to issuing an eviction order against the respondents. We are, therefore, unable to see any arguable grounds of appeal.

10. On whether the appeal may be rendered nugatory, we find no need to consider this aspect, having found there exists no arguable appeal. The result is that the application has no merit and is dismissed with costs to the respondents.

**DATED AND DELIVERED AT NYERI THIS 2ND DAY OF MAY, 2025.**

**J. LESIIT**

**.....**

**JUDGE OF APPEAL**

**ALI – ARONI**

**.....**

**JUDGE OF APPEAL**

**G. V. ODUNGA**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**