



Kimuyu & another v Njoroge & 2 others; Land Registrar Machakos County & another (Interested Parties) (Civil Application E523 of 2024) [2025] KECA 1128 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KECA 1128 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E523 OF 2024
W KARANJA, K M'INOTI & P NYAMWEYA, JJA
JUNE 20, 2025**

BETWEEN

PROFESSOR PETER KIMUYU 1ST APPLICANT

MARGARET KIMUYU 2ND APPLICANT

AND

BERNARD NGANGA NJOROGE 1ST RESPONDENT

GABRIEL MBUGUA NJAGI 2ND RESPONDENT

GRACE JOHN JOHN MULEI 3RD RESPONDENT

AND

LAND REGISTRAR MACHAKOS COUNTY INTERESTED PARTY

DISTRICT LAND SURVEYOR INTERESTED PARTY

(An application for stay of execution and injunction pending appeal of the Ruling of the Environment and Land Court at Machakos (A. Nyukuri J.) delivered on 17th September 2024 in ELC Case No. 372 of 1994)

RULING

1. Professor Peter Kimuyu and Margaret Kimuyu, the 1st and 2nd applicants herein, seek, by an application dated 7th October 2024, orders to stay execution of the ruling of the Environment and Land Court at Machakos (A. Nyukuri J.) delivered on 17th September 2024 in ELC Case No. 372 of 1994 and any consequential steps arising therefrom. They also seek an injunction restraining the respondents from interfering with their quiet possession of the suit property pending the hearing and determination of their intended Appeal. The main grounds for the application, which is brought pursuant to the provisions of Rule 5(2)(b) of the Court of Appeal Rules of 2022, are set out in the affidavit in support



thereof sworn on even date by the 1st applicant, and submissions dated 23rd October 2024 filed by Ondieki Orangi & Co. Advocates, the applicants' advocates on record.

2. In summary, the applicants aver that they are aggrieved by the said ruling which gave orders for eviction against the applicants from plot No. 26 Kitanga Settlement Scheme measuring 5 acres and have lodged a notice of appeal therefrom, and have an arguable appeal that requires to be heard on the merits. The grounds of appeal that the applicants particularized were as follows:
 - a. That the learned Judge erred in law and fact by failing to review the vague and blanket order granting possession to the Plaintiffs in the suit over an undefined and undemarcated parcel measuring only 5 acres within the larger 70-acre Plot No.26 Kitanga Settlement Scheme and making a practical order directing the Land Registrar Machakos County and District Surveyor Machakos to demarcate the exact suit property.
 - b. That the learned Judge erred in law by failing to consider that the 1st and 2nd Objectors are owners of a separate parcel of land contained within Plot No. 26 Kiranga Settlement Scheme measuring approximately 6.5 acres which did not form part of the suit property in ELC No. 372 of 1994 which is at peril of execution by the Plaintiffs on account of the ambiguous Decree dated 04/05/2022.
 - c. That the learned Judge erred in law and fact by failing to consider the Defendant's submissions to wit that the full Plot No. 26 Kiranga Settlement Scheme measuring 70 acres was owned separately by at least 6 individual owners who were all threatened by the blanket and ambiguous Decree orders made on 04/05/2022.
 - d. That the learned Judge erred in law by failing to find that there was no Survey Report filed by the Plaintiffs to identify the suit parcel measuring 5 acres and failing thereby to direct the Land Registrar and District Surveyor for Machakos County to carry out the requisite statutory mandates of delineating and identifying the specific 5 acres sought to be occupied by the Plaintiffs on the strength of the Decree dated 04/05/2022.
 - e. That the learned Judge erred in law by taking into account irrelevant considerations and failing to take into account relevant considerations such as the legal Land Control Board Consents issued in respect of the parcels namely on 31/03/1991, 28/08/1991 and 31/03/1993.
 - f. That the learned Judge erred in law by issuing an ultra vires Decree dated 04/05/2022 granting the Plaintiffs unfettered ownership akin to a floating charge of 5 acres over the entire parcel of land known as Plot No. 26 Kitanga Settlement Scheme.
3. The applicants counsel submitted that this Court has established that that the appellate court only has to satisfy itself that a single bona fide arguable ground has been raised as was held in *Damji Pragji Mandavia vs Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004, and that the impugned orders to evict the applicants from the suit property will be irreversible and threaten to render the appeal nugatory in event they are not stayed.
4. The application is opposed by Bernard Ng'ang'a Njoroge, the 1st respondent herein, who filed a replying affidavit sworn on 25th October 2024. He averred that the applicants have never appealed against the judgment in the court below and having failed to challenge the same, the present application is merely an academic exercise and the intended appeal does not raise any triable issues as it does not challenge the said judgment that gave rise to the orders of eviction. In addition, that the applicants were given a fair chance to participate in the lower court proceedings and this application is therefore an afterthought aimed at denying the 1st respondent enjoyment of the fruits of the judgment.



5. The other respondents and interested parties did not file any response to the application. In addition, while learned counsel Mr. David Tole, Mr. Kennedy Ondieki and Ms Purity Muriuki appeared for the 1st and 2nd applicants during the hearing of the application on 27th January 2025 held on the Court's virtual platform, and highlighted their written submissions, the respondents and interested parties were not represented, despite their advocates on record having been duly served with the hearing notice.
6. By way of a brief background to the application, the impugned ruling delivered by the ELC on 17th September 2024 was on two applications, the first one dated 20th September 2022 by the 1st and 2nd respondents herein, who sought orders of eviction against the 3rd respondent herein. This prayer was grounded on the fact that the ELC had allowed their claim that they are the registered proprietors of the suit property in an earlier judgment delivered on 4th May 2022. The suit property was described in the application as "plot Number 26 Kitanga Settlement Scheme measuring 5 acres or thereabouts".
7. The second application dated 21st March 2023 was filed by the applicants herein as objectors, and they sought orders that the ELC vacates and sets aside any attachment of the objector's property, as more particularized in the decree dated 4th May 2022. The applicants' case was that they were beneficial and actual owners of the property described in the decree dated 4th May 2022 and had a legal and equitable right over 6.5 acres within Plot No. 26 Kitanga Settlement Scheme which they had purchased from the 3rd respondent and constructed a matrimonial home thereon and were not parties to this suit. The ELC, after hearing the parties, dismissed the applicants' application with costs and allowed the 1st and 2nd respondents' application.
8. It is in this context that we have considered the application and arguments made by the applicants and the 1st respondent's response. The principles applicable in the exercise of this Court's discretion under Rule 5 (2) (b) of the Court of Appeal Rules of 2022 to grant a stay of execution or injunction are well settled. An applicant has to satisfy two requirements. Firstly, that he or she has an arguable appeal. Secondly, that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in *Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR. Both limbs must be demonstrated before a party can obtain a relief under rule 5(2) (b) (see *Republic vs Kenya Anti- Corruption Commission & 2 others* (2009) KLR 31; *Reliance Bank Ltd vs Norlake investments Ltd* (2002) I EA 227 and *Githunguri vs Jimba Credit Corporation No. (2) (1988) KLR 838*). In addition, this Court exercises original jurisdiction under Rule 5 (2)(b) as held in *Ruben & 9 others vs Nderitu & another* (1989) KLR 459 and *Trust Bank Limited and Another vs Investech Bank Limited and 3 Others* (2000) eKLR.
9. On whether the appeal is arguable, we are alive to the definition of arguability of an appeal or an intended appeal being one which raises a bona fide issue worth of consideration by the Court (see *Kenya Tea Growers Association & Another vs Kenya Planters Agricultural Workers Union*, Civil Application No. Nai. 72 of 2011 UR). We note that the applicants has raised grounds of appeal relating to identification, ownership and possession of the suit property. However, the ship in which those grounds would have been properly anchored has long sailed, since the said issues were the subject of the judgment delivered by the ELC on 4th May 2022, which the applicants had an opportunity to appeal against but did not.
10. Indeed, during the hearing of the application we inquired about the status from counsel for the applicants, who confirmed that the applicants did not appeal the judgment of the ELC. This was despite their joinder as parties to the suit as noted by the ELC in its ruling:

"17. On whether the objectors were party to this suit, it is not disputed that on 14th October 2019, Professor Peter Kimuyu and Mrs. Margaret Kimuyu filed a notice of motion of even



date and sought to be joined to these proceedings as interested parties. That application was allowed on 15th October 2019. The court further granted them leave to file pleadings and witness statements and documents however, they did not comply. Therefore the allegation that the objectors are not parties in this suit is misleading and incorrect. The joinder of Professor Peter Kimuyu and Mrs. Margaret Kimuyu to these proceedings as interested parties was allowed and that order was never appealed against, set aside, reviewed or varied and therefore they remain interested parties in this suit to date and cannot transform themselves into objectors.”

11. To the extent that the judgment of the ELC of 4th May 2022 that determined the issues of ownership and possession of the suit property was not appealed, we find that the applicants have not demonstrated that they have an arguable appeal. Even if it were to be found that the applicants have an arguable appeal, it is also notable that the applicants have alternative remedies against the 3rd respondent from whom they claim to have purchased the suit property, and to this extent any appeal they may file will not be rendered nugatory. This is bearing in mind that an appeal or intended appeal will be rendered nugatory where the resulting effect of not granting a stay of execution is likely to be irreversible or, if it is not reversible, where damages will not reasonably compensate the party aggrieved
12. For these reasons, we are not persuaded that the application dated 7th October 2024, has met the threshold for granting of the order sought of stay of execution of the ruling of the Environment and Land Court at Machakos (A. Nyukuri J.) delivered on 17th September 2024 in ELC Case No. 372 of 1994. The said application is accordingly dismissed with costs to the 1st respondent.
13. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE, 2025 WANJIRU KARANJA

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

K. M'INOTI

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

P. NYAMWEYA

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL SIGNED

DEPUTY REGISTRAR

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

