



**Timber Manufacturers and Dealers Limited v Mbugua & 3 others
(Administrators of the Estate of the Late Joseph Kiarie Mbugua) (Civil
Application E054 of 2025) [2025] KECA 1116 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1116 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E054 OF 2025
DK MUSINGA, M NGUGI & GV ODUNGA, JJA
JUNE 20, 2025**

BETWEEN

TIMBER MANUFACTURERS AND DEALERS LIMITED APPLICANT

AND

FLORENCE WAIRIMU MBUGUA 1ST RESPONDENT

SYLVIA MURUGI 2ND RESPONDENT

GRACW WANJIKU MBUGUA 3RD RESPONDENT

PETER CHEGE KIARIE 4TH RESPONDENT

**ADMINISTRATORS OF THE ESTATE OF THE LATE JOSEPH KIARIE
MBUGUA**

*(An application for injunction and stay of execution of the judgment
of the Environment and Land Court at Milimani (Oguttu-
Mboya, J.) dated 23rd January 2025 in ELC Case No. 163 of 2017)*

RULING

1. The applicants' Notice of Motion dated 4th February 2025 expressed to be brought under rule 5(2) (b) of the Court of Appeal Rules, 2022 seeks, in substance, two orders: that pending the hearing and determination of the applicant's intended appeal, this Court stays execution of the judgement and consequential decree rendered in Nairobi ELC No. 163 of 2017 – Florence Wairimu Mbugua and Another v Timber Manufacturers and Dealers Limited; and that pending the hearing and determination of the applicant's intended appeal, the Court grants a temporary injunction restraining the respondents, their servants and/or agents from evicting the applicant, selling, transferring, charging, disposing of, entering into, encroaching upon, trespassing onto or threatening to forcibly



enter upon and interfering with and/or in any manner whatsoever dealing with the property known as LR No. 4894/59 (now renamed Nairobi Block 186/4) (the suit property).

2. The application is supported by an affidavit sworn by Romano Rosiello, one of the directors of the applicant, in which it is averred: that by an agreement dated 6th August, 1990, Joseph Kiarie Mbugua (deceased) sold the suit property to the applicant for the sum of Kshs 4,000,000.00 which was paid in full, upon which the applicant immediately took possession thereof on 31st August 1990; that upon taking possession, the applicant made major developments and erected a residential home thereon and is still in possession to date, 34 years later; that apart from the residential home, the applicant also developed a rental house as a source of income and livelihood for its directors; that by the time of his demise, the deceased had not effected the transfer of the suit property to the applicant; that, as a result, the applicant instituted Nairobi High Court Commercial Case No. 1048 of 1994- Timber Manufacturers and Dealers Limited v Joseph Kiarie Mbugua and Consolidated Bank of Kenya; that in that case, the applicants sought orders of specific performance of the agreement, an order directing the deceased to discharge the charge in favour of the Consolidated Bank of Kenya (the Bank), an order directing the Bank to execute and deliver to the applicant a reconveyance of the suit property in favour of the applicant upon the discharge aforesaid, and for an award of general damages and the taking of accounts; that in its judgment, the learned Judge dismissed the applicant's suit against the Bank with costs and allowed the Bank's counterclaim against the applicants with costs, directed the refund of Kshs 4,000,000 paid by the applicant to the deceased as well as Kshs 75,157.50 being refund of rates paid, and awarded the applicant Kshs 1,000,000 in general damages; that the deceased, apart from filing a defence, did not participate in the proceedings; and that the deceased passed away on 22nd December 2006, 1 year and 9 months after the judgement was delivered but before settling the decree,
3. It was averred: that an appeal was preferred against the said judgement by the applicant in which a consent was entered settling the appeal, which consent was, at the instance of the respondents, reviewed by a ruling of this Court dated 27th September 2019; that the respondents, in their capacity as the administrators of the estate of the deceased, filed a suit being Nairobi ELC No. 163 of 2017 – Florence Wairimu Mbugua Another v Timber Manufacturers and Dealers Limited, seeking eviction orders against the applicant from the suit property, permanent injunction restraining the applicant from trespassing onto the suit property, a mandatory injunction directing the applicant to remove its belongings from the suit property, general damages and mesne profits in the sum of Kshs 104,000,000; that the applicant filed an amended defence and counterclaim seeking a declaration that it acquired the suit property by adverse possession, an order directing the respondents, as administrators of the deceased to execute necessary documents to effectuate the transfer of the suit property into the name of the applicant and in default, the Deputy Registrar of the ELC to do so; and that the learned Judge on 23rd January 2025 found in favour of the respondents and directed the applicant to give the respondents vacant possession of the suit property within 90 days, in default of which it would be evicted; and awarded the respondents Kshs 10,000,000 as general damages with costs.
4. It was deposed: that upon the delivery of the judgement, the applicant instructed its advocate to file an appeal against the decision on, inter alia, the grounds that the learned Judge erred in finding that the suit was res judicata yet the question of ownership by way of adverse possession was not before the court in the earlier suit; that a Notice of Appeal has been filed and copies of proceedings requested; that if the applicant loses possession of the suit property, its 30 years' worth of investments will go to waste; that there is a possibility that the suit property may be sold off or charged to a third party making orders of this Court impossible to implement; and that the tenants occupying the suit property may, in that eventuality, be evicted by the respondents, thus exposing the applicant to litigation and loss of primary source of income for its directors.



5. The application was opposed by a replying affidavit sworn by Florence Wairimu Mbugua on 28th February 2025 in which the deponent repeated the averments in the supporting affidavit as regards the earlier suit being High Court Case No. 1048 of 1994 Timber Manufacturers and Dealers Limited v Joseph Kiarie Mbugua and Consolidated Bank of Kenya and averred: that the applicant, in its Notice of Appeal only challenged the dismissal of its suit against the Bank; that upon reading the Notice of Appeal, the respondents believed that the applicant was no longer interested in the relief for specific performance and was satisfied with the award of Kshs 5,075,157.50; that the applicant did not file or serve a substantive appeal against the decision of the High Court; that the applicant's continued occupation of the suit property is illegal and unlawful; that the counterclaim filed by the applicant in ELC No. 163 of 2017 was clearly res judicata as the issues raised therein had been determined in HCCC No. 1048 of 1994, hence there are no arguable issues to be raised by the applicant in the intended appeal; that it is illegal for the applicant to continue occupying the suit property after having obtained a decree in its favour; and that the consent referred to by the applicant neither conferred any proprietary interest on the applicant over the suit property nor granted the applicant an express right to remain in possession and or occupation thereof since it only directed that a discharge be released to the applicant.
6. It was averred: that the applicant does not stand to suffer any financial loss or prejudice as the deceased's estate is vast with many assets worth tens of millions of shillings as demonstrated in the Grant of Letters of Administration hence capable of repaying Kshs 10,000,000, in the event that the appeal succeeds; that the respondents do not intend to sell the suit property but are against the continued occupation thereof by the applicant since it continues to occasion the estate substantial loss of income estimated at approximately Kshs. 750,000 to 1,000,000 per month; that the applicant is a limited liability company whose assets are unknown; and that should the Court be amenable to granting the orders sought, it should be on condition that Kshs 30,000,000 is deposited in Court or in an interest earning account.
7. When this matter came up for virtual plenary hearing on 1st April 2025, learned counsel, Mr Karuga Maina appeared with Ms, Anne Njoroge for the applicant, while learned counsel, Mr Lawrence Mbabu, appeared for the respondents. Learned counsel relied on their written submissions which they briefly highlighted.
8. We have considered the submissions made. In applications brought under rule 5(2)(b) of this Court's Rules, it is trite that for the applicant to succeed, it must be demonstrated that there is an arguable appeal and that the intended appeal, were it to succeed, would be rendered nugatory, absent an order for stay. See Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR.
9. In this case, the applicant's intended appeal will be based on, inter alia, the grounds that the learned Judge erred in finding that the matter was res judicata. It is argued that the earlier suit was based on breach of contract of sale between the applicant and the deceased while the later suit was based on adverse possession. It is not for us to interrogate whether or not the claim for adverse possession had any merit. It is also not for us to determine whether the intended appeal will succeed. Our duty, at this stage, is to determine whether or not the intended appeal is arguable, which in our case means the same thing as saying that it is not frivolous. A single arguable ground is sufficient to meet the requirement of an arguable appeal. In our view, the issue whether or not, in the circumstances of this case, res judicata was properly invoked is clearly arguable.
10. As regards the second condition, the applicant contends that it has been in possession of the suit property for about three decades and during that time, undertook substantial developments thereon. It is not denied that the applicant is in occupation of the suit property. Whether or not it is entitled to be in possession is a matter that will be determined in the appeal. This Court opined in Raol Investment Ltd. v Lake Credit Finance Ltd. [1998] KECA 97 (KLR) that in cases where the dispute revolves



around land, should the property pass to a third party, the appeal or intended appeal would be rendered nugatory. Similarly, in *Nyals (K) Ltd. v United Housing Estate Ltd.* 1995 KECA 131 (KLR) this Court found that:

“if we were to refuse a stay of execution of the decree in the Nairobi High Court Civil Case No 2137 of 1983, the applicant’s power to possess the suit premises may be removed beyond recall with the result that its intended appeal will, if successful, be rendered nugatory. To avoid such an eventuality, we think that the applicant’s application in this motion should be granted.”

11. We must, however, point out that it is not the position that in all cases where the applicant is in possession of the land in dispute, a stay must, inevitably be granted. Rather, the Court, in determining whether or not the intended appeal will be rendered nugatory, is entitled to consider the possibility, not only of dispossession, but also of irreversibility of the consequences of dispossession such as the acquisition of title by a third party.
12. As regards the amount awarded as general damages, which is on the face of it not a small amount, the respondents are administrators of the estate of the deceased. Whatever sum paid to them will be for the benefit of the estate and, in the event that the same is distributed to the beneficiaries, recovery thereof in the event that the appeal succeeds may well give rise to further litigation. The respondents have not demonstrated any prejudice that they stand to suffer if the stay is granted. While they complain that they are losing sums of money, it is not disputed that the applicant was awarded over Kshs 5, 000,000 in Nairobi High Court Commercial Case No. 1048 of 1994 - *Timber Manufacturers and Dealers Limited v Joseph Kiarie Mbugua and Consolidated Bank of Kenya*.
Whether or not the sum was settled is not certain.
13. We have said enough to show that the Notice of Motion dated dated 4th February 2025 is merited. We order that pending the hearing and determination of the intended appeal against the judgement and decree rendered in Nairobi ELC No. 163 of 2017 *Florence Wairimu Mbugua and Another v TimberManufacturers and Dealers Limited*: there be a stay of execution of the judgement and consequential decree rendered in that judgement; and that an injunction is hereby issued restraining the respondents, their servants and/or agents from interfering with the applicant’s quiet enjoyment of LR No. 4894/59 (now renamed Nairobi Block 186/4) and/or in any manner whatsoever dealing with the said property.
14. The costs of the application will be in the intended appeal.
15. We so order.

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

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

G. V. ODUNGA



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JUDGE OF APPEAL

I certify that this is the true copy of the original
signed

DEPUTY REGISTRAR

