



**Wachira v M'Twaruchiu & another (Civil Application
E049 of 2024) [2025] KECA 1072 (KLR) (5 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1072 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E049 OF 2024
W KARANJA, JW LESSIT & A ALI-ARONI, JJA
JUNE 5, 2025**

BETWEEN

PAUL WAMBUGU WACHIRA APPLICANT

AND

BETHA NDUMBA M'TWARUCHIU 1ST RESPONDENT

**MWICHWIRI TWO FARMERS COMPANY LIMITED (TWO) 2ND
RESPONDENT**

(An application for stay of execution of the judgment and decree of the Environment and Land Court in Nanyuki (K.Bor, J.) dated 30th November 2023 in ELC Case No. 002 of 2022)

RULING

1. Before the trial court, the 1st respondent sued the applicant and the 2nd respondent for, inter alia, general damages and eviction of the applicant from L.R. Laikipia Daiga Umande Block 6/396,397,398 and 399 (the suit land), costs of the suit and interest.
2. The applicant opposed the claim, and filed a statement of defence and counterclaim in which he stated that he bought shares from four members of the 2nd respondent and was allocated land Parcel No K-112 measuring 4 acres, which he developed and even built a permanent house from 1984. He claimed that the directors of the 2nd respondent fraudulently subdivided his land and gave it new numbers as 396, 397, and 399, which they gave to the 1st respondent. He prayed for, inter alia, an order declaring that the directors of the 2nd respondent sold and allocated parcel No. 113 and then subdivided No. 112 to new numbers and allocated and transferred fraudulently to the 1st respondent, though he was still in possession of the suit land; an order of declaration that the subdivision and transfer of his Parcel No. 112 numbers Laikipia Daiga Umande Block 6/396, 397 and 399 is illegal and unconstitutional and, therefore, null and void; an order for the cancellation of the above three titles and for the 1st



respondent's name to be removed and the applicant's name be entered in the register; and an order that the 1st respondent's claim is time barred and, therefore, bad in law.

3. On 30th November 2023, K. Bor, J. gave the following orders in disposal of the suit;

Parties were directed to engage the services of a surveyor to determine the aggregate size of the Land registered as Laikipia Daiga Umande Block 6/396,397,398 and 399 (Nyariguni) on the ground within 30 days of the date of the judgement; After ascertaining the aggregate size of the land comprised in Laikipia Daiga Umande Block 6/396,397,398 and 399 (Nyariguni) the aggregate land will be resurveyed and shared between the applicant and the 1st respondent. If the surveyor establishes that the whole land measures 5 acres then the 1st respondent will be entitled to 3 acres while the applicant will be entitled to 2 acres. If the aggregate land measures less than 5 acres then it will be shared between the 1st respondent and the applicant in the ratio 2:1; in determining the share that the applicant will be entitled to pursuant to the judgement the survey will be undertaken in a manner that ensures that the applicant's portion falls where he has built his house; the Land Registrar Laikipia County is directed to cancel the title deeds held by the 1st respondent over Laikipia Daiga Umande Block 6/396,397,398 and 399 (Nyariguni), upon conclusion of the survey ordered the Land registrar will issue new titles to the 1st respondent and the applicant in accordance with the ratio mentioned above; the costs of undertaking the survey will be borne by the 2nd respondent. In the event the 2nd respondent has ceased to exist or is otherwise unable to meet the surveyors costs, the costs of the survey will be shared equally by the applicant and 1st respondent; parties are directed to cooperate with the surveyor and the land registrar and to execute all the necessary documents towards the implementation of the orders of the court failing which the deputy registrar of the court will execute the documents and instruments necessary to effect the subdivision of the suit land and its allocation to the 1st respondent and the applicant in accordance with the judgement."

4. Being aggrieved by the decision of the trial court, the appellant filed the instant appeal and in the interim, the applicant is, through the notice of motion dated 4th June 2024, seeking to stay execution of the judgment, and the decree arising therefrom, pending hearing and determination of the appeal or in the alternative, the Court be pleased to order the parties to maintain status quo prevailing as to the registration, user and occupation of Laikipia Daiga Umande Block 6/396,397,398 and 399, pending the hearing and determination of the intended appeal.
5. Betha Ndumba M'Twaruchiu, (the 1st respondent), and Silas Mungatia (appearing on behalf of the 2nd respondent) swore replying affidavits dated 14th June 2024 and 31st December 2024, respectively. The 1st respondent opposed the application but the 2nd respondent supported the application.
6. When the application came up for hearing on 3rd February 2025, learned counsel Mr. Muia Mwanzia, appeared for the applicant, Mr. Mwendwa appeared for the 1st respondent; while Mr. Marete appeared on behalf of the 2nd respondent. Mr. Mwendwa informed the Court that his client has no intention of disposing of the land and asked the Court to dismiss the application. On his part, Mr. Marete conceded the application and urged the Court to grant orders of status quo.
7. In support of the motion, the applicant avers that he has an arguable appeal in that the learned trial Judge, despite the evidence on record showing how he purchased the suit lands from the original owners who were confirmed members of the 2nd respondent, erred in making a finding that was erroneous.



8. On her part, the 1st respondent averred that she has never lived and/or utilized the suit land as the applicant evicted her prompting her to file the suit in 2000; further that the applicant has been living on a portion of the suit land and that was why, to avert any eviction the trial court directed that upon survey being conducted, the applicant's portion of land should fall where he has built his house, and finally that she has built her house elsewhere and so even if the survey is conducted as ordered by the trial court, same is reversible should the applicant's appeal be successful.
9. On his part the 2nd respondent averred that the applicant is in possession of Laikipia Daiga Umande Block 6/396,397,398 and 399 and that the status quo should be maintained pending hearing and determination of the appeal.
10. We have considered the application along with the rival affidavits and submissions by the parties. In order to persuade the Court to stay execution, issue injunction or stay any further proceedings pursuant to the discretionary power granted under rule 5(2 (b) of this Court's Rules, 2022, an applicant must establish that there is an arguable appeal which, were it to eventually succeed, would be rendered nugatory owing to the failure to issue any of the stated orders. The aforesaid principles were succinctly expressed by the Supreme Court in *Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others* [2014] eKLR thus:

... The principles to be considered before a Court may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

 - i. the appeal or intended appeal is arguable and not frivolous; and that
 - ii. unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory..."
11. We shall constrain ourselves to the above parameters and eschew making any definitive findings at this stage, lest we embarrass the bench that will be seized of the task to hear and determine the substantive appeal.
12. On the limb on arguability of the appeal, the applicant claims to have purchased the portions he claims to own in 1984 from four members of the 2nd respondent. The 2nd respondent has conceded the application. In view of this concession, we don't think the applicant's claim to the suit land is frivolous. Bearing in mind that an arguable appeal is not necessarily one that will succeed, we are persuaded that the applicant has demonstrated that the appeal is arguable. The appellant should be given an opportunity to ventilate his claim before this Court on appeal.
13. On the nugatory aspect, although the 1st respondent says he has no intention of disposing of the suit land, the law is clear that for an application of this nature to succeed, an applicant needs to prove both arguability and the nugatory aspect. (See *Stanley Kang'ethe Kinyanjui -vs- Tony Ketter & 5 Others* [2013] eKLR.)
14. The orders issued by the trial court involve resurvey and re- registration of the suit land, which exercise will definitely change the physical outlook of the suit property as well as the ownership. Should the applicant eventually succeed on appeal, this resurveying will have been an exercise in futility. We note that the parties were agreeable to an order of status quo, so such orders will not prejudice any party.
15. As the applicant had prayed for an order of status quo as an alternative prayer, we are inclined to allow the said prayer. Accordingly, the notice of motion dated 4th June 2024 succeeds to the extent that parties



are ordered to maintain status quo prevailing as to the registration, user and occupation of Laikipia Daiga Umande Block 6/396,397,398 and 399, pending the hearing and determination of the intended appeal. We order that costs of the application be in the appeal.

DATED AND DELIVERED AT NYERI, THIS 5TH DAY OF JUNE, 2025.

W. KARANJA

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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
the true copy of the original.

Signed

DEPUTY REGISTRAR

