



REPUBLIC OF KENYA



KENYA LAW
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**Muthigani v Munene (Civil Appeal (Application) E022 of 2023)
[2025] KECA 1249 (KLR) (11 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1249 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL (APPLICATION) E022 OF 2023
W KARANJA, JW LESSIT & A ALI-ARONI, JJA
JULY 11, 2025**

BETWEEN

SYMON NYAMU MUTHIGANI APPLICANT

AND

CHARITY WANGUI MUNENE RESPONDENT

*(Application for stay of execution of Judgment and Decree and Order
delivered in the Environment and Land Court at Kerugoya (E.C.
Cherono, J.) delivered on 12th November, 2021 in ELC No. 375 of 2013)*

RULING

1. In this application dated 13th February, 2024 and brought pursuant to rule 5 (2)(b) of the [Court of Appeal Rules](#) (CAR), Symon Nyamu Muthigani, the applicant seeks two orders as follows:
 1. That this Honourable court be pleased to order that there be a stay of execution of judgment and decree/order given in the Environment and Land Court of Kerugoya ELC No. 375 of 2013 by E.C. Cherono, J. on the 12th of November 2023 pending the hearing and determination of the Appeal.
 2. That this Honourable Court be pleased to grant an order of injunction restraining the Respondent, her agents, servants, employees or any person claiming under the respondent from dealing with all that parcel of land known as Mwerua/Kagio/I8 pending the hearing and determination of this appeal.
2. The application is supported by the affidavit of even date sworn by the applicant. The applicant avers that after entry of judgment on 12th November, 2021, he filed a notice of appeal, a copy of which he has annexed to the application. He has since filed his appeal being Nyeri Civil Appeal No E022 of 2023. At the same time he sought and was on the 6th March, 2023 granted stay of the order of the trial court



for a period of 12 months. That the same was almost expiring at the time this application was filed. The applicant avers that he has an arguable appeal and that if the stay sought is not granted and the suit property is sold, the substratum of the appeal will be lost.

3. The application was heard before us through this Court's virtual platform on the 3rd February, 2025. Present for the applicant was learned counsel Mr. Makura. The respondent was not represented, however, we allowed the applicant to argue his application being satisfied that the Messrs Omenya & Company Advocates who are on record for the respondent were duly served with the hearing notice on the 3rd January, 2025. The respondent had not filed any response to the application, it was, therefore, unopposed. Mr. Makura wholly relied on his written submissions.
4. The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant, who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. See *RWW vs. EKW* [2019] eKLR. The power of this Court to grant stay is a discretionary power, and for the order to be granted the applicant must establish two principles, one that he has an arguable appeal, and two that the appeal will be rendered nugatory if the stay is declined and the appeal was successful.
5. As to whether the appeal is arguable, this Court has in this regard held as follows in *Somak Travels Ltd vs. Gladys Aganyo* [2016] eKLR:

“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.”
6. We have considered this application, the submissions filed, the affidavit in support and the annexed judgment and orders of the superior court, as well as the annexed memorandum of appeal. The suit concerned land, the applicant being the registered owner of Mwerua/Kagio/I8 of the suit land through transmission. The applicant has raised several grounds in his draft memorandum of appeal. The most pertinent one is the fact that the learned trial Judge ruled in favour of the respondent on the grounds she proved that she had acquired adverse possession of the suit property even though she had not pleaded the same in her pleadings. The applicant's position was that the trial court considered extraneous matters that were not before it. We are satisfied that this is an arguable point that deserves determination by this Court.
7. As to the nugatory aspect, the trial court made a positive finding in favour of the respondent, that she had acquired title through adverse possession but ended it at that without making a definitive order of what then should happen next in regards to ownership. That aside, we note that the subject matter of the suit is land. The applicant avers that unless the stay sought is granted, the appeal will be rendered nugatory and the appellant will suffer irreparable loss. We are satisfied that if the ownership of the suit land changes and the appeal eventually succeeds, the land may get beyond the reach of the applicant. We are therefore satisfied that the applicant has met the threshold for the second principle for grant of stay of execution pending appeal and that he deserves to have the substratum of the suit preserved pending the hearing and determination of his intended appeal
8. The result is that the application is granted in the following terms:
 1. A stay of execution of judgment and decree/order given in the Environment and Land



Court of Kerugoya ELC No. 375 of 2013 by E.C. Cherono, J. on the 12th of November 2023 is granted pending the hearing and determination of the Appeal.

2. Due to the nature of the case, we direct the Deputy Registrar of this Court to carry out Case Management with a view of giving a hearing date on priority.

DATED AND DELIVERED AT NYERI THIS 11TH DAY OF JULY, 2025.

W. KARANJA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

