



**Nderitu v Muhotetu Farmers Company Ltd & another (Civil Application  
E135 of 2024) [2025] KECA 1227 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1227 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E135 OF 2024  
S OLE KANTAL, JW LESSIT & AO MUCHELULE, JJA  
JULY 4, 2025**

**BETWEEN**

**JOHN MAINA NDERITU ..... APPLICANT**

**AND**

**MUHOTETU FARMERS COMPANY LTD ..... 1<sup>ST</sup> RESPONDENT**

**CHARLES WARUGONGO KIERU ..... 2<sup>ND</sup> RESPONDENT**

*(An application for stay of execution of judgment pending appeal, lodging, hearing and determination of an intended appeal against the Judgment of the Environment and Land Court at Nanyuki (Bor, J.) delivered on 14th November, 2024 in E.L.C. Case No. 6 of 2023)*

**RULING**

1. In a judgment delivered on 14<sup>th</sup> November, 2024 Bor, J. dismissed the 1<sup>st</sup> defendant's counter-claim; made a declaration that the 2<sup>nd</sup> defendant in the suit is the absolute registered proprietor of the suit property; directed that the 1<sup>st</sup> defendant to vacate the suit property within 45 days of the date of judgment failing which an eviction order would issue. The Judge issued a permanent injunction to restrain the 1<sup>st</sup> defendant from trespassing, entering, remaining or interfering with the suit property; the plaintiff was awarded mesne profits against the 1<sup>st</sup> defendant of Kshs.16,000/= per month from 1<sup>st</sup> November, 2006 until the 1<sup>st</sup> defendant vacated the suit property and the plaintiff was awarded costs of the suit to be paid by the 1<sup>st</sup> defendant it being ordered that the defendants bear costs of the counter-claims.
2. The parties before Environment and Land Court (ELC) at Nanyuki in ELC No. 6 of 2023 were Muhotetu Farmers Company Ltd (as plaintiff); John Maina Nderitu (as 1<sup>st</sup> defendant) and Charles Warugongo Kieru (as 2<sup>nd</sup> defendant).



3. By Motion on notice said to be brought under rules 5(2)(b) of the [Court of Appeal Rules](#) and section 3 of the [Appellate Jurisdiction Act](#), John Maina Nderitu (hereafter “the applicant”) moves the Court for an order in the main:

“That this Honourable Court be pleased to grant a stay of execution of the judgment delivered on 14<sup>th</sup> November, 2024, pending the lodging, hearing and determination of the 1<sup>st</sup> Defendant/Applicant’s intended appeal.”

4. Amongst the many things said in grounds in support of the application and repeated in the applicant’s supporting affidavit are that this Court has jurisdiction to preserve the subject matter of an intended appeal through either injunction or a stay of execution as held in various cases like [Equity Bank \(Kenya\) Limited v West Bank MBO Limited](#) [2013] eKLR and by the Supreme Court of Kenya in [Teachers Service Commission v Kenya National Union of Teachers](#) Sup. Civil Application 16 of 2015; that the applicant who is dissatisfied with the said judgment intends to appeal and has filed a notice of appeal; that in terms of the judgment intended to be appealed the applicant will be evicted after 45 days of the judgment; that the intended appeal has “...greater chances of success...” The applicant states that the Judge misapprehended the nature of proprietary estoppel in [Commissioner of Lands v Hussein](#) [1968] EA 584; that the 1<sup>st</sup> respondent (Muhotetu Farmers Company Ltd) had authorized the applicant to develop the suit land by erecting permanent offices, toilets and complete a petrol station which he did at costs of Kshs.37,000,000 on land which, before the said developments was worth Kshs.5,000,000; that the Judge ignored the doctrine of lis pendens; that the 2<sup>nd</sup> respondent (Charles Warugongo Kieru) knew of the developments on the land and by purporting to purchase the suit land he wanted to defeat overriding interests within the meaning of section 309 of the Registered Land Act (repealed); that 1<sup>st</sup> and 2<sup>nd</sup> respondents set out to commit a fraud when the suit was pending; that the trial court ignored documentary evidence placed before it which showed that it was the 1<sup>st</sup> respondent which had applied for change of user of the suit property. The case of [Madhubaper International Limited v Kerr](#) [1985] KECA 116 (KLR) is cited for the proposition that a subject matter should be preserved on the basis that an appeal court might arrive at a different conclusion from the trial court when an applicant’s intended appeal is heard. Also cited in the Motion in the case of [Reliance Bank Limited v Norlake Investments Limited](#) [2002] EA 227 where it was held that the court will stay execution of orders whose effect would be to destroy enterprises. It is also stated that the relative hardships of the parties is an important consideration and [Butt v Rent Restriction Tribunal](#) [1979] eKLR is cited for what ought to be considered in determining whether to grant or refuse stay of execution pending appeal.

5. Beatrice Osicho, an Advocate of the High Court of Kenya and counsel in the office of the Official Receiver (the Liquidator of the 1<sup>st</sup> respondent) in a replying affidavit depones that the applicant’s application;

“... is an abuse of the Court Process, is brought in bad faith by the Applicant who seeks to further derail and interfere with the quiet possession and enjoyment of the 2<sup>nd</sup> Defendant’s Right to Property under Article 40 of the [Constitution](#) of Kenya...”

6. She says that the applicant has not satisfied principles for grant of stay of execution pending appeal saying that the intended appeal is not arguable:

“...and is frivolous on the basis that the orders sought cannot be implemented as the 2<sup>nd</sup> Defendant is already in occupation of the Suit Property as the registered owner. Therefore, there is nothing for the Court to preserve or stay execution over...”



7. The 1<sup>st</sup> respondent depones that the applicant has not shown that he cannot be compensated in damages if the appeal succeeds. The deponent goes into a rendition of the history of the case where the 1<sup>st</sup> respondent, a land buying company, leased the suit property to the applicant for 5 years and 3 months from 1<sup>st</sup> August, 2001 to 1<sup>st</sup> November, 2006 for purposes of running a temporary petrol station; that there was a landlord/tenant relationship which did not confer any ownership of the suit property to the applicant; that the lease agreement had an express condition that the applicant should not erect any permanent structures on the suit property without express consent of the 1<sup>st</sup> respondent; that the applicant erected a permanent structure on the suit property without the 1<sup>st</sup> respondent's permission; that the applicant was in breach of terms of the lease by erecting a permanent structure on the suit property and failing to pay rent leading the 1<sup>st</sup> respondent to institute court action in Nyahururu PMCC No. 355 of 2006 praying that the applicant be evicted; that the lease ended but the applicant had remained in occupation; that the suit was transferred to Nakuru High Court as Misc. Application No. 557 of 2012, then to Nyahururu Environment and Land Court (ELC) No. 224 of 2017 and finally to Nanyuki ELC No. 6 of 2023 where it was heard and determined on 14<sup>th</sup> November, 2024. The deponent states further that the 1<sup>st</sup> respondent placed the suit property in the market for sale and that the same was purchased by the 2<sup>nd</sup> respondent and was transferred to him and:

“ThatT since the 2<sup>nd</sup> Respondent is currently in possession of the suit property, there is nothing for court to stay execution on or preserve; and it is trite law that if an act is void, then it is in law a nullity. It is not only bad, but incurably bad.”

8. The deponent states at paragraph 20 of the affidavit:

“ThatT the right to own property under the [Constitution of Kenya 2010](#), ought to be respected, and further, the 2<sup>nd</sup> Respondent rights as asserted by the Superior Court and as conferred by the Certificate of Title deserves to be regarded...”

9. It is stated that the applicant was in rent arrears, was collecting rent from sub-tenants but was not paying rent to the 1<sup>st</sup> respondent and we are asked to dismiss the application as lacking in merit.

10. In a replying affidavit the 2<sup>nd</sup> respondent gives a history of the case that started at the Magistrates' Court at Nyahururu where the 1<sup>st</sup> applicant applied for orders that a lease between the applicant and the 1<sup>st</sup> respondent had expired and the applicant be evicted from the suit land and how the suit was transferred to various courts; that he had seen advertisement in local dailies where the suit property had been offered for sale, he made a bid and purchased the suit property at Kshs.16,021,005 and a Certificate of Lease had been issued to him on 4<sup>th</sup> March, 2014; that the order restraining the 1<sup>st</sup> respondent from selling the suit property was issued long after on 28<sup>th</sup> March, 2014:

“That I took possession of the suit property upon expiry of 45 days and I am now in actual possession in terms of the judgment of the superior court (Annexed hereto and marked “CWK-7 (a)(b) and (c)”) are copies of photographs showing the current status of the property.”

11. The 2<sup>nd</sup> respondent depones that since he is in possession of the suit property the intended appeal cannot be rendered nugatory and the application has been overtaken by events and should be dismissed.

12. We have considered the application and the written and oral submissions that were made before us at the hearing of the application on 3<sup>rd</sup> March, 2025 where the applicant was represented by



Senior Counsel Dr. Kamau Kuria and the 2<sup>nd</sup> respondent represented by learned counsel Miss Njeri Wamaitha. The 1<sup>st</sup> respondent did not appear but had filed a replying affidavit and written submissions.

13. The principles that apply in an application of this nature are well known and were well summarized in the case of *Stanley Kangethe Kinyanjui v Tony Ketter & Others* [2013] eKLR. For an applicant to succeed he must firstly demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that it is not frivolous. Such an applicant must in addition, show that the appeal would be rendered nugatory absent stay.
14. The applicant has raised many arguable issues on appeal including whether the doctrine of lis pendes applied in the case where it appears that a court issued status quo orders but the suit property was sold either before or after those orders had been issued. There is the issue of proprietary estoppel; there is the issue whether the 2<sup>nd</sup> respondent had knowledge as he purchased the suit property that the applicant had a claim against the 1<sup>st</sup> respondent – all these are arguable issues and as had been held by this Court in various cases an arguable point on appeal is not one that will succeed, it is the one that calls for consideration and determination by the Court – See *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd* Civil Application No. Nai 345 of 2004.
15. What about the nugatory aspect that the applicant must also satisfy to be entitled to an order for stay of execution of judgment or injunction under rule 5(2)(b) of the rules of the Court?
16. It is deponed by the respondents, and this has not been challenged by the applicant, that the suit property was offered for sale in the open market and was sold and transferred to the 2<sup>nd</sup> respondent. It is said that the status of the suit property since 4<sup>th</sup> March, 2014 when the same was transferred to the 2<sup>nd</sup> respondent is that the 2<sup>nd</sup> respondent was put in possession and has been in occupation of the same since then, over 10 years ago.
17. We think in the premises that the applicant has not shown how the intended appeal would be rendered nugatory in circumstances where the applicant was removed from the suit property which is currently occupied by the 2<sup>nd</sup> respondent who purchased the same and had it transferred to him in 2014.
18. In those circumstances the applicant is not entitled to an order of stay of execution pending appeal or an injunction and the Motion fails and is dismissed with costs to the respondents.

**DATED AND DELIVERED AT NYERI THIS 4<sup>TH</sup> DAY OF JULY, 2025.**

**S. OLE KANTAI**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL A.O.MUCHELULE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

