

**IN THE COURT OF  
APPEAL AT KISUMU**

**(CORAM: OKWENGU, OMONDI & JOEL NGUGI, JJ.A)**

**CIVIL APPLICATION NO. E124 OF**

**2023 BETWEEN**

**MOSES MEIBAKO NGATUNY.....1<sup>ST</sup> APPLICANT**

**KOIYAGI NGATUNY *alias***

**KOIYAKI TOBIKO ATETI (Suing as the  
legal representative of Ateti Ole Nembo, Deceased). 2<sup>ND</sup> APPLICANT**

**SITONI NGATUNY.....3<sup>RD</sup>**

**APPLICANT**

**AND**

**PEIPEI OLE MOSOIKO.....1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR TRANSMARA.....2<sup>ND</sup>**

**RESPONDENT HON. ATTORNEY GENERAL....**

**.....3<sup>RD</sup> RESPONDENT**

*(An Application for injunction/Conservatory Orders pending the hearing and determination of the Intended Appeal against the Judgment and Decree of the Environment and Land Court at Kilgoris (Washe, J.) dated 25<sup>th</sup> September, 2023)*

*in*

***ELC Case No. 7 OF 2022)***

**\*\*\*\*\***

**\*\*\* RULING OF THE**

**COURT**

1. The applicants herein have approached this Court for orders of injunction pending the hearing and determination of the intended appeal against the judgment and decree of the Environment and Land Court at Kilgoris (*Emmanuel M. Washe, J.*) dated 25<sup>th</sup> September, 2023. Their prayers are in the following

terms:

1) - *spent* -

2) - spent -

3) - spent -

4) - Pending the hearing and determination of the intended appeal arising from the judgment and decree rendered on the 25<sup>th</sup> day of September, 2023 vide KILGORIS ELC APPEAL NO. 7 OF 2022, the Honorable Court be pleased to grant an order of temporary injunction restraining the 1<sup>st</sup> Respondent, his servants and/or agents from selling, charging, disposing off, evicting the applicants, entering onto, encroaching upon, trespassing onto, ploughing, cultivating, grazing on, threatening to forcibly enter upon, fencing, interfering with the applicants' occupation, possession and/or in any other manner dealing with and/or otherwise interfering with LR NO. TRANSMARA/MOITA/488.

5) - Pending the hearing and determination of the intended appeal arising from the judgment and decree rendered on the 25<sup>th</sup> day of September, 2023 vide KILGORIS ELC APPEAL NO. 7 OF 2022, the Honorable Court be pleased to grant an order of maintenance of status quo to the extent that the Respondent, his servants and/or agents are stopped and/or barred from selling, charging, disposing off, evicting the applicants, entering onto, encroaching upon, trespassing onto, ploughing, cultivating, grazing on, threatening to forcibly enter upon, fencing, interfering with the applicants' occupation, possession and/or in any other manner dealing with and/or otherwise interfering with LR NO. TRANSMARA/MOITA/488.

6) - The Honourable Court be pleased to grant an order

*of inhibition directed against the title in respect of LR.  
NO.*

*TRANSMARA/MOITA/488, to bar and/or inhibit any dealings and/or otherwise transactions over the said property, pending the hearing and determination of the intended appeal.*

*7) - Further in the alternative and without prejudice to the foregoing, the Honourable Court be pleased to grant a conservatory order, over and in respect of LR. NO. TRANSMARA/MOITA/488, with a view to preserving and/or otherwise conserving the status of the suit property which has been under occupation, possession and/or otherwise use of the applicants herein, pending the hearing and determination of the intended appeal.*

*8) - Costs of this Application and of the main Appeal be borne by the 1<sup>st</sup> Respondent.*

*9) - Such further and/or other orders as the Court may deem fit and expedient.*

2. A very brief summary of the case is as follows. The original claim *vide* ***Kilgoris Principal Magistrate's Court Case Environment and Land Court ELC No. 09 of 2018*** by the 1<sup>st</sup> respondent herein (who was the plaintiff therein) through an Amended Plaint dated 12<sup>th</sup> April, 2018 was for the following reliefs:

*a) A permanent injunction barring the defendants (applicants herein and the 2<sup>nd</sup> respondent herein) by their agents, assignees, or any other person working under from interring and or burying the body of one Moseka Daniel Ngatuny (deceased) on LR. NO. TRANSMARA/MOITA/488.*

*b) A declaration that the land registrar had no power to cancel and rectify the register of LR. NO.*

*TRANSMARA/MOITA/488 under section 79(2) of the  
Land*

*Registration Act, 2012.*

- c) An order for cancellation and rectification of the register in LR. NO. TRANSMARA/MOITA/488 in favour of the plaintiff.*
- d) Costs of the suit to be borne by the defendants.*
- e) Any other relief that the Honourable Court may deem fit to grant.*

3. In response, the defendants in the original suit (the applicants herein) filed a Statement of Defence and Counter Claim and sought the following reliefs:

- a) Declaration that the transactions and/or entries entered and/or endorsed in the register of LR. NO. TRANSMARA/MOITA/488, on 28<sup>th</sup> day of October 2015, to the 13<sup>th</sup> day of November 2015, respectively, prior to and/or before the issuance of grant of letters of administration in respect of the estate of ATEI OLE NEMBO, now deceased, were unlawful, illegal and void, and in any event, amounted to intermeddling in the estate of the deceased.*
- b) An order for cancellation and nullification of the title deed in respect of LR. NO. TRANSMARA/MOITA/488, fraudulently issued in the name of the plaintiff /1<sup>st</sup> defendant to the counter claim and restoration of the name of ATETI OLE NEMBO, the deceased on the register.*
- c) A permanent injunction restraining the plaintiff/1<sup>st</sup>*

*defendant to the counter claim either by himself, agents, servants and/or anyone claiming under the said plaintiff/1<sup>st</sup> defendant to the counter claim from entering upon, re-entering, taking possession, trespassing onto, cultivating, building structures, grazing, interfering with and/or in other manner dealing with LR. NO. TRANSMARA/MOITA/488 and/or any portion(s) thereof.*

*d) Costs of the cross suit be borne by the defendants to the counter claim jointly and/or severally.*

*e) Such further and/or other relief as the Honourable Court may deem fit and expedient.*

4. In response to the Statement of Defence and Counter Claim, the 1<sup>st</sup> respondent (the plaintiff therein) filed a Reply to the Defendants Statement of Defence and Counter Claim, seeking for both to be dismissed with costs.

5. In that suit, the 1<sup>st</sup> respondent claimed that LR. NO. TRANSMARA/MOITA/488 (hereinafter “the suit property”) belonged to one Moseka Daniel Ngatuny (deceased), who approached him with a sale offer of the entire piece of land. The 1<sup>st</sup> respondent claimed that he visited the suit property, inspected it and accepted the sale offer. Thereafter, he claimed that he proceeded to undertake an official search and confirmed that the suit property reflected the name of Moseka Daniel Ngatuny as the registered owner. An agreement for sale was then prepared and both the vendor, Moseka Daniel Ngatuny, and the 1<sup>st</sup> respondent executed the same and purchase price

was fully paid. Thereafter,

the 1<sup>st</sup> respondent processed the title deed of the suit property in his name, and was issued with the title deed on 13<sup>th</sup> November, 2015.

6. The 1<sup>st</sup> respondent claimed that afterwards, he proceeded to take possession of the suit property through keeping of cattle on a portion of the property. Additionally, the 1<sup>st</sup> respondent stated that the vendor had leased out a portion of the property for sugar cane planting and there was a mutual agreement that once the sugarcane was harvested, the 1<sup>st</sup> respondent would take possession of the entire suit property. Also, during cross examination at the trial court, the 1<sup>st</sup> respondent stated that during the inspection of the suit property, he saw two houses which, he said, the vendor informed him belonged to him (i.e. the vendor).
7. According to the 1<sup>st</sup> respondent, unfortunately the vendor died in 2018 and the 1<sup>st</sup> respondent received information that the family of the vendor wanted to bury his remains on the suit property. The 1<sup>st</sup> respondent challenged the said plan of the vendor's family through the area chief but was informed that the suit property did not belong to him and that its ownership had, in fact, been changed to another person's name. The 1<sup>st</sup> respondent, through his advocates, wrote a letter to the District Land Registrar, Trans Mara asking for the reasons for the title changes but he received no response by the time of the hearing of the suit. Consequently, he asked the trial court to cancel the changes which had been made in terms of ownership of the suit property and that his name be reinstated into the register of the

suit property.

8. The 1<sup>st</sup> respondent produced the following documents in support of his case: *a copy of the Official Search dated 9<sup>th</sup> November, 2015; Agreement for Sale dated 9<sup>th</sup> November, 2015; a copy of the vendor's identification card; a copy of the Transfer Form from the vendor in favour of the 1<sup>st</sup> respondent; copy of the Stamp Duty Assessment together with the receipt; and a copy of the Green Card of LR. NO. TRANSMARA/MOITA/488.*
9. On their part, the applicants claimed that the suit property belonged to Ateti Ole Nembo (who died in 1989), the vendor's father and not the deceased. They denied knowledge of any sale relating to the suit property and stated that they became aware of the 1<sup>st</sup> respondent's claim during the burial of the vendor. They indicated that the 1<sup>st</sup> respondent was not in possession nor did he have any cattle on the suit property. However, they knew him as a neighbour on the suit property.
10. The applicants produced the following documents in support of their case: *a copy of the Death Certificate of the late Ateti Ole Nembo issued on 10<sup>th</sup> November, 2017 which confirmed that he died in 1989; a copy of Letters of Grant Ad Litem of the late Ateti Ole Nembo dated 28<sup>th</sup> March 2018; a copy of the Green Card showing entries over the suit property; a copy of a Certificate of Official Search dated 4<sup>th</sup> April 2018, which indicated that the suit property was registered in the name of the late Ateti Ole Nembo on 10<sup>th</sup> December, 1997; a copy of the Title Deed for the suit property in the name of the 1<sup>st</sup> respondent; and a copy of a letter dated 28<sup>th</sup> February, 2018 from the District Land Registrar, Transmara.*

11. The Land Registrar Transmara (2<sup>nd</sup> respondent herein) did not file any defence to the 1<sup>st</sup> respondent's plaint and judgment was entered against it.

12. Upon due consideration of the suit, the trial court ruled in favour of the 1<sup>st</sup> respondent (plaintiff therein) and made the following orders:

**a) A declaratory order do issue that the land registrar unlawfully cancelled and rectified the register to LR. NO. TRANSMARA/MOITA/488.**

**b) An order hereby do issue for cancellation of the register to LR. NO. TRANSMARA/MOITA/488 in favour of the plaintiff.**

**c) The defendant failed to prove the counter claim. Consequently, the counter claim is hereby dismissed.**

**d) The plaintiff shall have the costs of the suit.**

13. The applicants were aggrieved by the decision of the lower court and filed an appeal against the whole judgement dated 10<sup>th</sup> December, 2019, vide **KILGORIS ELC APPEAL NO. 7 OF 2022**.

14. The Appeal was dismissed on 25<sup>th</sup> September, 2023. The determination of the appeal turned on three issues: *whether the suit property was ever registered in the name of the late Ateti Ole Nembo; whether the suit property was lawfully transferred to the 1<sup>st</sup> respondent; and whether the Land Registrar, Transmara lawfully cancelled the 1<sup>st</sup> respondent's title to the suit property under section 79(2) of the Land Registration Act No. 3 of 2012.*

15. In all the three issues, the appellate court ruled in favour of the 1<sup>st</sup> respondent. Its most consequential finding was that the applicants had not proved their case to the required threshold of

evidence, because they had not produced in court an Adjudication Record from the Land Adjudication Office which would have confirmed that the suit property was originally adjudicated and/or allocated to the late Ateti Ole Nembo and/or for the use of his family who include the applicants herein. Additionally, the court found that the land registrar had unilaterally cancelled several entries in the Green Card of the suit property including the entry of the late Moseka Daniel Ngatuny and the 1<sup>st</sup> respondent, without giving any of them or their representatives a right to be heard; save for a letter dated 28<sup>th</sup> February 2018, produced by the applicants which indicated that investigations into the suit property had been done and it had been noted that the title of the suit property was fraudulently obtained without proper procedure. The court found that the applicants did not present any evidence that the said letter by the 2<sup>nd</sup> respondent was indeed served to the late Moseka Daniel Ngatuny to enable him file the intended objection. The court further found that the 2<sup>nd</sup> respondent could neither cancel nor rectify the entry of the late Moseka Daniel Ngatuny on the Green Card, in the manner indicated on the said letter dated 28<sup>th</sup> February 2018, whether it was done fraudulently or through misrepresentation as alleged by the applicants. It was the court's considered view that the late Moseka Daniel Ngatuny was lawfully registered as the proprietor of the suit property on 28<sup>th</sup> October 2015, unless otherwise ordered by a competent court of law.

16. Consequently, based on this analysis and findings, the appellate

court was satisfied that the late Moseka Daniel Ngatuny was lawfully registered as the owner of the suit property from 28<sup>th</sup>

October 2015, and, therefore, properly transferred it to the 1<sup>st</sup> respondent upon following the prescribed transfer procedure. The transfer procedure included the Transfer Form received by the 2<sup>nd</sup> respondent on 13<sup>th</sup> November 2015, upon payment of Stamp Duty, that duly approved the entire process which transferred the suit property from the late Moseka Daniel Ngatuny to the 1<sup>st</sup> respondent, and he was issued with a title deed.

17. During the virtual hearing of the application, learned counsel Ms. Ochwal, appeared for the applicants, while learned counsel Mr. Nyambati, appeared for the 1<sup>st</sup> respondent. There was no representation for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents though the Court was satisfied that they had been served.

18. Rule 5(2)(b) of the Court of Appeal Rules, which the applicants have invoked before us, provides that:

***“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may***

***-***

***(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or stay of any further proceedings on such terms as the Court may think just.”***

19. As this Court has said countless times, this rule clothes this Court with original jurisdiction to preserve the substratum of the

appeal pending before it. The invocation of the rule does not usher

in an analysis akin to an appeal against the impugned decision of the superior court; neither is the rule aimed at correcting the exercise of discretion by the trial court.

20. It is common ground between the parties that for the applicants to succeed, they must satisfy the twin principles enunciated in our jurisprudence: demonstration that the appeal is arguable; and a demonstration that the appeal would be rendered nugatory but for the prayed-for relief of stay of execution or injunction.
21. On the first principle, whether the appeal is arguable, we have to consider whether the appeal, as filed, raises at least a single *bona fide* arguable point noting, as the Court defined it in **Stanley Kang'ethe Kinyanjui vs. Tony Keter & 5 Others [2013] eKLR**, that an arguable appeal is not one with a high probability of succeeding; it is, instead, one which ought to be argued fully before the Court. Differently put, an arguable appeal is one which is not frivolous.
22. Relying on their Draft Memorandum of Appeal dated 5<sup>th</sup> October, 2023, the applicants have stated that the intended appeal is arguable. In this regard, they have contended that the suit property was fraudulently and/or irregularly transferred to the 1<sup>st</sup> respondent, without a Certificate of Confirmation of Grant being issued, as the original registered owner, the late Ateti Ole Nembo, died in 1989 and his beneficiaries never carried out any Probate Proceedings for purposes of administration of the estate of the deceased. They further contended that the suit property was transferred to the late Moseka Daniel Ngatuny in 2015,

long after

the original owner had died and in the same year, the said Moseka Daniel Ngatuny transferred the suit property to the 1<sup>st</sup> respondent.

23. The applicants also stated that the appellate court erred in its decision with regard to the letter dated 28<sup>th</sup> February 2018, by the 2<sup>nd</sup> respondent. They argued that the 2<sup>nd</sup> respondent had indicated that the 1<sup>st</sup> respondent irregularly acquired the suit property and cancelled his title. Thus, it was improper for the learned judge to arrive at its said decision.

24. On his part, the 1<sup>st</sup> respondent insists that the intended appeal is not arguable. He argued that the sale of the suit property in favour of the 1<sup>st</sup> respondent was proper and above board and that he was a bona fide purchaser for value without any notice of infirmity in the title. Hence, his registration was protected by law. He further argued that the appeal to this Court is based on a negative order which does not demonstrate substantial loss to warrant an order for injunction or stay pending the intended appeal.

25. In our view, there is no question that the appeal herein presents arguable points. The question whether the 1<sup>st</sup> respondent's title can be said to be unimpeachable in the face of the allegations that the suit property could only have changed hands fraudulently since it was part of the estate of Ateti Ole Nembo, which was yet to be go through probate proceedings, is an eminently arguable point on appeal and not a fanciful ground as the 1<sup>st</sup> respondent argues.

26. Turning to the second principle, whether the appeal would be rendered nugatory if the orders sought are not granted, the position in law is that this depends on whether or not what is sought

to be stayed if allowed to happen is reversible; or if it is not reversible, whether damages will reasonably compensate the party aggrieved. See **Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227.**

27. In this regard, despite the vehement protestations by the 1<sup>st</sup> respondent, it is evidently clear from the record, and the nature of the reliefs he sought in the courts below, that he is not in possession of the suit property. Indeed, in his testimony before the trial court, the 1<sup>st</sup> respondent admitted that he noted that there were houses on the property but that the deceased told him that they were the deceased's houses. Additionally, the 1<sup>st</sup> respondent actively sought eviction orders against the applicants. One can only seek eviction orders against one who is already in possession of the suit property. We are, therefore, persuaded that the applicants are in possession of the suit property – and it being a land matter, and in view of their claim that this is ancestral land where they have resided for more than seventy (70) years, the equities tilt heavily in their favour: if the sought injunction is not granted and the applicants are evicted; and the suit property otherwise dealt with in a manner adverse to the claimed ownership of the applicants, the intended appeal would be pre-emptively extinguished. If the applicants are evicted or the suit property – which is presently registered in the name of the 1<sup>st</sup> respondent – changes hands, the viability of the applicant's appeal would be irreversibly extinguished.

28. It is important to give a quick response to an oft-raised objection made by the 1<sup>st</sup> respondent to the orders sought: the 1<sup>st</sup>

respondent argues that there can be no stay against a negative order. The

argument pivots from the fact that what is on appeal before us is an order dismissing the applicant's appeal at the ELC. The answer to that objection is the text of Rule 5(2)(b): Under that Rule, this Court can either issue a stay or an injunction. The applicants have approached this Court for the latter.

29. The conclusion, then, is that the applicants have satisfied both prongs of the test for granting stay or injunction orders under Rule 5(2)(b) of the Court of Appeal Rules, 2022. We, therefore, hereby grant the orders sought in prayers 4 and 6 in the Notice of Motion dated 5<sup>th</sup> October, 2023. It is the only just outcome to preserve the substratum of the appeal until it is heard and determined. The costs will be in the cause.

30. Orders accordingly.

**Dated and delivered at Kisumu this 15th day of November, 2024.**

**HANNAH OKWENGU**

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

**H. A. OMONDI**

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

**JOEL NGUGI**

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

I certify that this is  
a true copy of the  
original.

*Signed*

**DEPUTY REGISTRAR**

