



REPUBLIC OF KENYA



**KENYA LAW**  
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**Malindi Rights Forum(MRF) & another v Nation Land Commission & 10 others (Environment & Land Petition 11 of 2020) [2023] KEELC 22353 (KLR) (13 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22353 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION 11 OF 2020  
NA MATHEKA, J  
DECEMBER 13, 2023**

**BETWEEN**

**MALINDI RIGHTS FORUM(MRF) ..... 1<sup>ST</sup> PETITIONER**

**KABUKI FARMERS ASSOCIATION ..... 2<sup>ND</sup> PETITIONER**

**AND**

**NATION LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 4<sup>TH</sup>  
RESPONDENT**

**KURAWA LIMITED ..... 5<sup>TH</sup> RESPONDENT**

**KENSALT LIMITED ..... 6<sup>TH</sup> RESPONDENT**

**KRYSTALLINE SALT LIMITED ..... 7<sup>TH</sup> RESPONDENT**

**KEMU SALT PACKERS PRODUCTION LTD ..... 8<sup>TH</sup> RESPONDENT**

**MOMBASA SALT WORKS LIMITED ..... 9<sup>TH</sup> RESPONDENT**

**MALINDI SALT WORKS LIMITED ..... 10<sup>TH</sup> RESPONDENT**

**SOLAR SALT WORKS LIMITED ..... 11<sup>TH</sup> RESPONDENT**



## RULING

1. The application is dated 8<sup>th</sup> March 2023 and is brought under Sections IA, B, 3 and 3A of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 seeking the following orders;
  1. That all further proceedings in this suit being ELC Constitutional Petition No 11 of 2020 be stayed on such terms as the Honourable Court may deem just, pending the hearing and determination of the Applicant's intended appeal against the whole of the Ruling delivered by Hon Lady Justice N Matheka on the 25<sup>th</sup> January 2023.
  2. That the costs of this application be provided for.
2. It is based on the grounds that on the 12<sup>th</sup> of October 2022, the Applicant filed a Notice of Preliminary objection substantially challenging the Petitioners' capacity to institute these proceedings as named and described in the Petition. The Court in delivering its Ruling on the 25<sup>th</sup> January 2023 (the "Ruling") dismissed the Preliminary Objection and held that the Petitioners have capacity to these proceedings. Dissatisfied by the Ruling, the Applicant filed a Notice of Appeal on the 31<sup>st</sup> January 2023 together with a letter requesting for certified proceedings of this suit. With the matter now coming up for pre-trial case management on the 13<sup>th</sup> March 2023, it is evident that the Petition is progressing towards its substantive hearing. Based on the grounds raised in the Applicant's Preliminary Objection, the question of the Petitioners' capacity to sue is germane to the Petition filed in these proceedings. If the orders sought for in this application are not granted as prayed, the hearing of the Petition before this Court will deny the Applicant an opportunity to challenge the foundation of these proceedings, consequently the appeal shall be rendered nugatory. Unless an order for stay of proceedings is granted at the inter-partes hearing of this application pending the hearing and determination of the Applicant's intended appeal, the Applicant's constitutional and legal fights stand to be severely prejudiced and/or compromised.
3. The second application is dated 24<sup>th</sup> April 2023 and is brought pursuant to Section 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, 2012, Order 26 of the *Civil Procedure Rules*, 2010 seeking the following orders that;
  - a. Pending the hearing and determination of this application, the Honourable court be pleased to stay the proceedings in the main Petition being ELC Constitutional Petition No 11 of 2020.
  - b. Pending the hearing and determination of the main Petition, this Honourable court be pleased to direct the Petitioners to deposit security for the whole or any part of the costs of Kurawa Industries (5<sup>th</sup> Respondent), Krystalline Salt Limited (7<sup>th</sup> Respondent), Kemu Salt Packers Production Limited (8<sup>th</sup> Respondent) and Malindi Salt Works (10<sup>th</sup> Respondent) within such a time and in such amounts as this Honourable Court will deem just.
  - c. In default of compliance with such orders as it will be given in (b) above, the petition herein be struck out as against the 5<sup>th</sup>, 7<sup>th</sup> 8<sup>th</sup> and 10<sup>th</sup> Respondents.
  - d. The cost of this application be provided for.
4. It is founded on the grounds that on the 12<sup>th</sup> October 2022, Kensalt Limited the 6<sup>th</sup> Respondent herein filed a Notice of Preliminary Objection challenging the Petitioner's capacity to institute ELC Constitutional Petition No 11 of 2020. Vide its decision dated 25<sup>th</sup> January 2023 (the Ruling), the



Honourable Court dismissed the Preliminary Objection and declared that the Petitioners have capacity to institute these proceedings. The matter was set down for pre-trial case management on the 13<sup>th</sup> of March 2023, it is evident that ELC Constitutional Petition No 11 of 2020 is progressing towards its substantive hearing. The Petitioners claim to be registered organizations, however no proof has been tendered to that effect.

5. Further, the affidavit in support of the ELC Constitutional Petition No 11 of 2020 was sworn by persons claiming to be current elected officials and representatives of the Petitioners, but no authority to swear the affidavit or a resolution to that effect has been annexed. The claim as filed against the Respondents is a sham and has no reasonable prospects of success. The petition seeks to impose adverse conditions on the Respondents herein and as a result, it will expose the Respondents to astronomical expenses in defending the petition and the multiple applications. It is only just and fair that the Respondents be indemnified prior to the suit progressing against the huge amounts of money that is to be spent in the prosecution and defence of the petition and its incidentals, before subjecting the Respondents to more costs and expenses. That should the Respondents be successful, there is risk that they will be unable to recover the expenses and disbursements that they have so far expended in defending the frivolous claims.
6. This court has considered the applications and the submissions therein. In the first application dated 8<sup>th</sup> March 2023 the Applicant seeks stay of proceedings in this suit being ELC Constitutional Petition No 11 of 2020 be stayed on such terms as the Honourable Court may deem just, pending the hearing and determination of the Applicant's intended appeal against the whole of the ruling delivered by this court on the 25<sup>th</sup> January 2023. The principles for granting stay of execution are provided for under Order 42 rule 6 (1) of the *Civil Procedure Rules* as follows:

“No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred, shall be at liberty, on an application being made, to consider such application and to make such orders thereon as may to it seem just, any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have the orders set aside.”

Order 42, rule 6 states:

“No order for stay of execution shall be made under sub-rule (1) unless:-

- a. The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and



3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
  
6. The principles governing the exercise of the court's jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicant must show that they have an arguable appeal and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory. These principles were well stated in the case of *Reliance Bank Ltd (In Liquidation) v Norlake Investments Ltd* – Civil Appl. No Nai. 93/02 (UR), thus;
 

" Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

  1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,
  2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction."
  
7. The question of stay pending appeal has been canvassed at length in various authorities, such as in the Court of Appeal decision in *Chris Munga N. Bichange v Richard Nyagaka Tongi & 2 Others* eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of proceedings as thus;
 

" ..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated....."
  
8. In the case of *Mohamed Salim T/A Choice Butchery v Nasserpuria Memon Jamat* (2013) eKLR, the court stated that;
 

" That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right ....."
  
9. We are further guided by this court's decision in *Carter & Sons Ltd v Deposit Protection Fund Board & 2 Others* Civil Appeal No 291 of 1997, at Page 4 as follows:
 

" . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . . the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay."
  
10. On perusal of the court record I find that ruling was delivered on the 25<sup>th</sup> January 2023 dismissing the Preliminary Objection and held that the Petitioners have capacity to these proceedings. Dissatisfied by the Ruling, the Applicant filed a Notice of Appeal on the 31<sup>st</sup> January 2023. Kensalt Limited the



6<sup>th</sup> Respondent stated that the Constitution at Article 22 obligates any person claiming infringement, violation or denial of rights to institute court proceedings, However, by holding that the said regulations of article 22 of the Constitution donates a broad general right of locus standi is erroneous. That the affidavit in support of the ELC Constitutional Petition No 11 of 2020 was sworn by persons claiming to be current elected officials and representatives of the Petitioners but no authority to swear the affidavit or a resolution to that effect has been annexed. That the court in Kipsiwo Community Self Help Group v Attorney General & 6 Others (2013) eKLR has previously held that just because the allows unincorporated bodies to sue, does not vest such bodies with legal capacity, and such bodies do not become persons in law, and cannot therefore be litigants or sue in their own standing. They still have to use the agency of a person recognized in law as having capacity to sue and be sued. That the 6<sup>th</sup> respondent thus, has an arguable appeal which raises issues worthy of ventilation before the Honorable Court. I find that the appeal hinges upon the capacity of the Petitioners to sue and find that the intended appeal is arguable. Secondly, I am persuaded that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. Having found so the application dated 24<sup>th</sup> April 2023 will equally be stayed to await the outcome of the appeal. I find that the applicant has fulfilled the above grounds mentioned to enable me grant the stay. I find the application dated 8<sup>th</sup> March 2023 is merited and I grant the same. Costs of the application to be in the cause.

11. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 13<sup>TH</sup> DAY OF DECEMBER 2023.**

**N.A. MATHEKA**

**JUDGE**

