



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

CIVIL APPLICATION NO. NAI 249 OF 1997 (UR 107/97)

1. LALI SWALEH LALI

2. FAQIK KAHALE SKEKUWE

3. KHALID BWANA MBERE

4. KALUME KATUBU.....APPLICANTS

AND

1. STEPHEN MATHENGE WACHIRA

2. OMAR KHAMISI BALLETH

3. COMMISSIONER OF LANDS

4. THE ATTORNEY GENERAL RESPONDENTS

**(An application for stay of Execution in an intended Appeal from the Ruling
and Orders of the High Court of Kenya at Nairobi (Justice Ole Keiwua)**

dated 31st July, 1997

in

H.C.C.C. NO. 3374 OF 1997)

RULING OF THE COURT

We have no doubt that the applicant's intended appeal against the ruling of Ole Keiwua, J. is not a frivolous one. The respondents in the present application had sought the striking out of the amended plaint filed by the applicants, the plaintiffs in the main suit, on the ground that it did not disclose any cause of action against the 1st and 2nd respondents and that the suit was consequently, frivolous, vexatious, scandalous and an abuse of the process of the court. A number of substantial and complicated issues were raised in the hearing of the respondent's application to strike out. The suit concerned the ownership of a fishing village, Mayunga Fishing Village, on which, the applicants who hail from a long line of fishermen, claim that they and their ancestors had been permanently settled since some fifty years

ago, and on which they and their ancestors had been in occupation of, and used as a fishing base, even before the beginning of this century. This fishing village the applicants claim, has been wrongly and fraudulently registered in the names of the 1st and 2nd respondents by the 3rd respondent, who is the Commissioner of Lands. The 4th respondent, the Attorney General was joined in the suit in accordance with the Government Proceedings Act. The law that apply to the suit are mainly statutes which are well known not to be of easy application. These are the Adjudication Act, the Registered Land Act and the Limitation Act. The difficulty entailed in the application of these statutes is also apparent in the ruling of the learned judge of the High Court whereby he took the rather drastic action of striking out the applicants' suit and against which the applicants intend to appeal to this court.

In the application before us brought by the applicants for stay of the ruling of the learned judge of the High Court, it has further emerged that the historic Agreement between the Sultan of Zanzibar and Great Britain made on 14th December, 1895, and old related legislation such as Orders in Council made as far back as 1902 and subsequently also in colonial times, which were not considered by the learned judge of the High Court, will also fall to be considered but not by us at this stage. There is also the issue of fraud to be looked into. For these reasons we do not therefore think that the applicants' intended appeal is frivolous.

But would the appeal be rendered nugatory if the stay sought by the applicants is not granted? Yes it would. We are dealing here with applicants who claim and this has not been refuted, that they and their ancestors have been in occupation of the fishing village as it were from time immemorial, carrying on their one and only livelihood of fishing.

In the result, the applicants' application for stay is hereby granted. Costs will be in the appeal.

Dated and delivered in Nairobi this 18th day of December, 1997.

A. M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

G. S. PALL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.