Ahmed & another v Lesirma & 5 others (Civil Application E128 of 2024) [2025] KECA 939 (KLR) (23 May 2025) (Ruling)

Neutral citation: [2025] KECA 939 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E128 OF 2024

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

MAY 23, 2025

BETWEEN

AYAN ABSHIR AHMED ..... 1ST APPLICANT

SAADIA MALELE IBRAHIM ..... 2ND APPLICANT

AND

SIMEON S LESIRMA ..... 1ST RESPONDENT

JAMES WANGAI KOINANGE ..... 2ND RESPONDENT

MOMBASA AFRIGAS DISTRIBUTORS LIMITED ..... 3RD RESPONDENT

CHIEF LAND REGISTRAR ..... 4TH RESPONDENT

NATIONAL LAND COMMISSION ..... 5TH RESPONDENT

ATTORNEY GENERAL ..... 6TH RESPONDENT

(Being an application for stay of execution pending appeal from the entire Judgement of the Environment and Land Court of Kenya at Mombasa (Kibunja, J.) delivered on 6th November 2024 in ELC No. 224 of 2013)

RULING

1. The 1st respondent, Simeon S. Lesirma, filed a suit before Mombasa Environment and Land Court (the ELC) by way of a Plaint dated 9th October 2013, which was later amended on 20th March 2019, seeking a total of eleven orders. The dispute before the ELC concerned the ownership of Plot L.R. No. MN/1/6640 (the suit property).

2. The learned Judge was satisfied that the 1st respondent proved his case and issued orders in his favour in terms of prayers (i), (ii), (iii), (iv), (v) and (vi) of the Amended Plaint, which basically conferred ownership of the suit property to the 1st respondent.

3. Aggrieved by the decision, and in exercising their right of appeal, the applicants, Ayan Abshir Ahmed and Saadia Malele Ibrahim, filed a Notice of Appeal dated 6th November 2024 but, first, they filed the instant application by way of a Notice of Motion dated 12th November 2024 by which they seek stay of execution of the aforesaid decision of the trial court as follows:

   i. That pending the hearing and determination of the applicant's intended appeal from the Judgement of Kibunja, J. delivered on 6th November 2024 in ELC Suit No. 224 of 2013, this Court he pleased to order stay of execution of the Decree and Orders emanating from the Judgement (Kibunja, J.) delivered on 6th November 2024 in ELC Suit No. 224 of 2013 between *Simeon S. Lesirma vs. James Wangai Koinange & 6 Others*;

   ii. That this Court be pleased to grant any other orders that it deems mete and just; and

   iii. Costs of this application be provided for.

4. The Motion is supported by the affidavit of the 1st applicant deposed on even date and a further affidavit sworn on 27th November 2024. The 1st applicant deposes that the decision of the trial court is detrimental to them (the applicants) as it will affect their right to own property; that they will not be able to recover the suit property in the event that they succeed on appeal; that the 1st respondent admitted in cross- examination that he never went to collect his title deed, and that neither did he respond or object to, or challenge the Registrar's request to swap his parcel of land with that of the 2nd respondent, James Wangai Koinange, in the year 2000; and that the trial court misunderstood, misinterpreted and misapplied the facts of the matter by holding that the 1st respondent objected to the swapping of the suit property without any evidence on record.

5. It is further deposed that the 1st respondent slept on his rights from the year 2000, and only woke up from slumber in 2013 when he filed a claim over the suit property after it had passed to three individuals; and that, therefore, the 1st respondent was undeserving of the trial court's pronouncement as to his ownership of the suit property.

6. As regards the arguability of the appeal, the 1st applicant listed five grounds of appeal, among them the restatement of indefeasibility and sanctity of title under the provisions of sections 26, 80(2) and 81 of the *Land Registration Act*; the doctrine of laches in respect of claim to land; and the rights of an innocent bona fide purchaser for value without notice.

7. In opposing the application, the 1st respondent swore a replying affidavit dated 26th November 2024. He argued that he was the registered owner of the suit property, which ownership traces back to a letter of allotment and as was encapsulated in the impugned judgment; that the applicant has sought execution of the judgment in a similar application dated 7th November 2024 before the superior court, and whose directions on hearing were issued on 8th November 2024 and a hearing date given for 4th December 2024; and that, therefore, the applicant is on a forum-shopping spree.

8. As to the arguability of the appeal, the 1st respondent contends that, none exists for the reasons that: neither the applicant nor the 2nd respondent contested the holding by the ELC that he was the rightful owner of the suit property; and that the 4th, 5th and 6th respondents confirmed under oath that he was the original allottee of the suit property, which fact was attested by the history of his acquisition.

9. As to whether the appeal will be rendered nugatory if the orders sought are not granted, it is the 1st respondent's view that his constitutional right to property is protected; that no rights allegedly accruing to the applicants were infringed as their purported acquisition of the suit property was found to be unlawful; that, there is no threat of execution since no decree has been extracted, nor has taxation of costs been commenced; and that, it has not been demonstrated that the 1st respondent is impecunious and cannot compensate the applicants should the appeal succeed.

10. In summary, it is the 1st respondent's case that the twin principles requisite for grant of stay of execution under rule 5(2) (b) of this *Court's Rules, 2022* have not been met; and that, consequently, we should dismiss the application with costs.

11. We heard this appeal on 16th December 2024. Learned counsel Mr. Abdiaziz appeared for the applicants, learned counsel Mr. Kahindi for the 1st respondent, learned counsel Mr. Waweru for the 2nd and 3rd respondents and learned counsel Miss. Waswa for the 4th and 6th respondents. The 5th respondent, the National Land Commission, did not file a response or attend Court despite being served with a hearing notice.

12. In highlighting written submissions dated 27th November 2024, Mr. Abdiaziz relied on the case of *Guhad & Another vs. Amoni & 20 others* (2023) KECA 546 (KLR) where it was held that, in circumstances such as in this case, there has to be a balance of hardship between the two contending parties; that, for the reason that the applicants have been in possession of the suit property for over 15 years, they are the party that stand to suffer most hardship if a stay order is not granted by being rendered homeless; and that, nothing stops the respondent from executing a judgment that was granted in his favour.

13. Mr. Kahindi for the 1st respondent highlighted their written submissions dated 3rd December 2024. Counsel submitted that the appeal is not arguable for reasons that there are two titles to the suit property, and that the Court ought to take into account that the 1st respondent's title was first in time. He referred to the High Court decision of *Gitwany Investment Limited vs. Tajmal Limited & 3 others* (2006) eKLR and this Court's decision of *Arthi Highway Developers Limited vs. West End Butchery Limited & 6 others* (2015) KECA 816 (KLR), which underscored the fact that the holder of a genuine title cannot be dispossessed of its interest by a fraudster; the Supreme Court decision of *Dina Management Limited vs. County Government of Mombasa & 5 others* (2023) KESC 30 (KLR), which discussed the principle of indefeasibility of a title, and for the proposition that the appeal would not be rendered nugatory absent stay as the trial court found that the applicants' title was unlawful; and *Republic vs. Municipal Council of Mombasa & 2 others Ex-Parte Adopt-A-Light Limited* (2008) eKLR for the proposition that stay of execution cannot be issued to temporarily validate the invalidity of the grant held by the applicants.

14. Mr. Waweru for the 2nd and 3rd respondents supported the application, although he did not file any formal response or submissions. A similar approach was taken by Miss Waswa for the 4th and 6th respondents. It was Miss Waswa's submission that a grant of stay of execution will not serve the best interest of the parties to the appeal.

15. We have considered the application, the supporting affidavits, the 1st respondent's replying affidavit, the respective submissions and the law. The only issue that fall for our determination is whether the applicants deserve the stay orders sought.

16. In order to succeed in an application under rule 5(2) (b) of the *Court of Appeal Rules, 2022* for stay of execution or of proceedings pending appeal, an applicant has to satisfy the twin principles enunciated in numerous decisions of this Court, namely that: an applicant must demonstrate that they have an

arguable appeal; and that the intended appeal (or appeal if already filed) will be rendered nugatory if the execution of the impugned decree, order or proceedings is not stayed. Both limbs must be demonstrated conjunctively to the Court's satisfaction.

17. This Court in *Trust Bank Limited and Another vs. Investech Bank Limited & 3 others* (2000) eKLR delineated its jurisdiction in such an application as follows:

> " The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case..."

18. On whether the appeal is arguable, the settled principle is that even a single bona fide arguable ground will suffice. An arguable appeal is not one which must necessarily succeed, but one which is deserving of consideration by the Court. In *Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 others* (2013) eKLR, this Court described an arguable appeal as follows:

> " vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.
>
> viii). In considering an application brought under Rule 5(2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal."

19. A look at the grounds of appeal in an undated draft memorandum of appeal proffered by the applicant, some of which we have mentioned above, demonstrates that they are not idle, and that they are worthy of further consideration. Thus, the applicants deserve a chance to ventilate their arguments at the hearing of the appeal.

20. As to whether the intended appeal will be rendered nugatory if the orders sought are not granted, the applicants' counsel urged us to consider which party will suffer more hardship. It is trite that the factors which will render an appeal nugatory are to be considered within the circumstances of each case. In doing so, the Court is to consider the conflicting claims of each party (See *Reliance Bank Limited vs. Norlake Investment Limited* (2002) 11 EA 227).

21. In the case of *African Safari Club Limited vs. Safe Rentals Limited* (2010) eKLR, this Court held:

> "With the above scenario of almost equal hardship by the parties it is incumbent upon the Court, pursuant to the overriding objective to act justly ..... put the hardship on the scales..... We think that the balancing act as described in the analysis of the positions of the parties before us, is in keeping with one of the principal aims of the oxygen principle of treating both parties with equality or in other words placing them on equal footing as far as it is practicable, ...".

22. It is not disputed that the applicants have been in occupation of the suit property for over 15 years now, and that there is considerable developments which have taken place thereon. In our view, failure to grant stay will mean that the title may be revoked, thus leaving the applicants landless. On a balance of scale, the party who is likely to suffer more hardship are the applicants. The 1st respondent undoubtedly holds a judgment in his favour which he is entitled to execute at any time. It is for this reason we find and hold that, if execution of the judgment proceeds, it will no doubt render the appeal nugatory.

23. Consequently, we find and hold that the applicants have satisfied the twin principles for grant of a stay order. Accordingly, the application dated 12th November 2024 is merited and is hereby allowed as prayed with costs to abide the outcome of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MAY, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

Deputy Registrar