



**Saggaf v Edarus & 3 others (Civil Application E121 of 2024)
[2025] KECA 1396 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1396 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E121 OF 2024
F TUIYOTT, KI LAIBUTA & GWN MACHARIA, JJA
JULY 31, 2025**

BETWEEN

MOHAMMED MAULA SAGGAF APPLICANT

AND

SALMA ABUBAKAR EDARUS 1ST RESPONDENT

ABUBAKAR MALIK SAGGAF ALAWY 2ND RESPONDENT

GHAZI MALIK FEISAL SAGGAF ALAWY 3RD RESPONDENT

TUDOR LIGHT LIMITED 4TH RESPONDENT

(Being an application for orders of injunction pending hearing and determination of the intended appeal arising from the ruling of the Environment and Land Court at Mombasa (L. Naikuni, J.) delivered on 15th October 2024 in ELC No. E006 of 2023)

RULING

1. In an application dated 29th October 2024, Mohamed Maula Saggaf (the applicant) seeks two related injunction orders, pending hearing and determination of an intended appeal; that the respondents be restrained by themselves, their servants agents or otherwise howsoever from evicting, harassing, intimidating, threatening, provoking, inciting, trailing or in any other manner whatsoever interfering with the applicant’s stay in Plot title Mombasa Block XXVI/5 (the suit property); and that the respondents by themselves, their servants, agents or otherwise howsoever from developing, constructing on, selling, charging or in any manner disposing of the suit property.
2. The case sought to be made out by the applicant before the trial court can be abridged. Salma Abubakar Edarus (the 1st respondent), Abubakar Malik Saggaf Alawy (the 2nd respondent), Ghazi Malik Feisal Saggaf Alawy (the 3rd respondent), and the applicant are family. The 1st respondent is the sister-in-law of the applicant having been married to the applicant’s brother Malik Feisal Saggaf Alawy (now



deceased). The 2nd and 3rd Respondents are the biological children of the 1st Respondent born of the union with the deceased and therefore the nephews to the applicant.

3. While the deceased was away in the United States of America, the 1st, 2nd, and 3rd respondents and the applicant, together with the applicants' parents, lived together in a rented house near Blue Room Restaurant within Mombasa Island. The deceased died on 21st October 2003 while in the United States of America, and a sum of approximately Kshs.7,920,000.00, being compensation from the Government of the USA having served in the USA Military, was paid to the 1st respondent. It was agreed by the family that the money would be spent to purchase a house.
4. After scouting for a property, the family settled on what it thought to be suitable being a 2-storey home situate on the suit property. At the back of the house was an undeveloped portion. The purchase price was Kshs.10,600,000.00. The shortfall of about Kshs.2,500,000.00 was paid by the applicant. The applicant asserts that the family agreed that the suit property would be held in trust by the 1st respondent as trustee for the benefit of the 2nd and 3rd respondents and the applicant's parents. For his contribution of part of the purchase price, the applicant was to own the vacant portion and, to give effect to this, the property would be subdivided. The subdivision process was commenced and substantially done, but not completed.
5. The grievance of the applicant is that the suit property was transferred without his knowledge to the 2nd and 3rd respondents, who sought to sell it to Tudor Light Limited ("the 4th respondent"), a developer. In the suit filed by the applicant, he sought the following prayers:
 - a. A declaration that there existed a constructive trust or an implied trust between the 1st Defendant and the Plaintiff over the suit property where the 1st defendant held the undeveloped "portion B" of PLOT TITLE NUMBER MOMBASA BLOCK XXVI/5 as a trustee of the plaintiff, and the developed portion/house ("Portion A") of PLOT TITLE NUMBER MOMBASA BLOCK XXVI/5 as a trustee of the plaintiff's father (Abdulrahman Saggaf Alawy), the plaintiff's mother (SOFIA SAGAFU KIBOGA), the 2nd and 3rd defendants;
 - b. A declaration that the 1st Defendant breached her fiduciary duties as a trustee by transferring the suit property to the 2nd and 3rd defendants without regard to the unregistered interests of the plaintiff and those of the plaintiff's parents in the suit property;
 - c. A declaration that the 2nd and 3rd Defendants did not acquire a good title over PLOT TITLE NUMBER MOMBASA BLOCK XXVI/5 and that the transfer of the suit property was null and void;
 - d. Alternatively;
 - i. A declaration that the Plot Title Number MombASA BLOCK XXVI/5 is a trust property where the plaintiff owns the undeveloped portion ("Portion B") while the 1st defendant, the parents of the plaintiff or their estates, the 2nd and 3rd defendants are joint beneficiaries of (Portion A") in accordance with Muslim succession law;
 - ii. A declaration that the 2nd and the 3rd defendants are joint trustees of PLOT TITLE NUMBER MOMBASA BLOCK XXVI/5 where the plaintiff owns the undeveloped portion (Portion B") while the 1st defendant, the parents of the plaintiff or their estates, the 2nd and 3rd defendants are joint beneficiaries of the house/developed portion (Portion A") of the suit property in accordance with Muslim succession law;



- iii. This Honourable court do determine the value of the undeveloped portion (“Portion B”) and the developed portion (Portion A”) of Plot Title Number Mombasa Block XXVI/5;
 - iv. A further mandatory injunction compelling the 2nd and 3rd defendants to jointly with the plaintiff sale the suit property, Plot Title Number Mombasa Block XXVI/5 and surrender the equivalent value of the undeveloped portion (Portion B”) of the suit property to the Plaintiff and distribute the equivalent value of the building (Portion A”) among the beneficiaries of the estate of the deceased.
6. The suit suffered an early blow because, in a ruling dated 15th October 2024, the trial Court (L. Naikuni, J.) found it to be time- barred. The ruling aggrieved the applicant, who duly filed a notice of appeal evincing an intention to appeal and challenge it before this Court.
 7. The applicant asserts that the draft memorandum of appeal raises serious arguable issues, and that he will suffer irreparable harm which cannot be compensated by way of damages if the orders sought are not granted.
 8. Responding on behalf of the 1st, 2nd and 3rd respondents, the 1st respondent states that the terminal benefits paid by the US Government was paid to her as a sole nominated beneficiary; that she applied those benefits to acquire the suit property; that she transferred the suit property to her children, the 2nd and 3rd respondents, when they attained the age of majority; and that the 2nd and 3rd respondents have, in turn, entered into a joint venture agreement with the 4th respondent for the development of the suit property.
 9. She denies that the applicant made any contribution towards the purchase of the property or that she owes a fiduciary duty to him. The 1st respondent states that the applicant has stayed on the suit property for the last 20 years without paying rent or any outgoings.
 10. When learned counsel, Mr. Munyithya for the applicant and learned counsel Mr. Salim representing the 1st, 2nd and 3rd respondents, appeared before us, they chose to rely on the written submissions filed on behalf of their clients without any oral highlights. There was no appearance for the 4th respondent though duly served with the hearing notice. The submissions filed are more or less a regurgitation of the supporting and replying affidavits filed in respect of the application and we need not rehash them.
 11. Before us is an application for injunction brought under Rule 5(2)(b) of the Court of Appeal Rules. When counsel for the applicant urges us to consider the applicants plea for injunctive orders against the principles set out in *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358, he is fairly off the mark. A 5(2)(b) injunction is granted on different considerations and it is on those considerations that we determine the matter before us.
 12. To secure grant of the order, the applicant must demonstrate that he has an arguable appeal which need not be of such strength as to necessarily succeed at the hearing of the appeal but which is not frivolous and, therefore, deserves interrogation by the appellate court (see *Kenya Tea Growers Association & another v Kenya Plantation and Agricultural Workers Union* [2012] eKLR). The second condition, and this is conjunctive with the first, is that the appeal will be rendered nugatory if stay is not granted, the term nugatory being given its widest meaning. See *Permanent Secretary Ministry of Roads &*



another v Fleur Investments Limited [2014] eKLR where this Court, in citing Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227, stated as follows:

“In Reliance Bank Limited v Norlake Investments Ltd [2002] 1 E.A. 227, this Court held that:

“..... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”

A trifling appeal is one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law.”

13. So as to conclude that the applicant’s suit was time barred, the learned Judge held that time within which to bring the action began to run in 2005 when the 2nd and 3rd respondents were registered as owners of the suit property. The applicant argued then, and proposes to maintain that argument at appeal, that time ought to have been reckoned from June 2023 when he discovered the alleged fraud. While it is not for us to ponder on which argument prevails, we think the contention raised by the applicant is serious enough to warrant reflection in a full-blown appeal. In a word, the applicant’s appeal is arguable.
14. On the second limb, the applicant contends that, should stay not be granted, then the loss he will suffer cannot be compensated by way of damages because it is within his knowledge that property prices in Kizingo area have shot up considerably, and that he and his family have lived on the property for close to 20 years and that he has developed an attachment to the property and considers it his home.
15. However, the arguments set up by the applicant are defeated by his own case at the trial. Although as a main prayer the applicant seeks to have the alleged trust recognised and enforced he seeks, in the alternative, to be paid the value of the undeveloped portion of the suit property. What the applicant is unwittingly saying is that compensation in monetary terms is an adequate remedy. In that sense, the alternative order sought by the applicant is for a money decree.
16. As a general rule, this Court will not grant a stay against a money decree unless it is demonstrated by the applicant that the respondent will be unable to repay when required or that it will be exceptionally difficult to recover it (see for example Kenya Hotel Properties Limited v Willesden Investments Limited [2007] eKLR. This is how we have to approach the current argument.
17. In so far as the applicant has not demonstrated, nay alleged, that the respondents are not in a position to pay up the compensation when called upon, then it has not been established that the appeal will be rendered nugatory if we do not grant the injunctions sought.
18. The upshot is that the Notice of Motion dated 24th October 2024 lacks merit and is hereby dismissed with costs.

DATED AND DELIVERED AT MOMBASA THIS 31ST DAY OF JULY, 2025.

F. TUIYOTT

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.



.....

JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

