



**Mwinyikai v Elephant Oils Limited & 5 others (Civil Application E028 of 2024) [2025] KECA 1301 (KLR) (18 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1301 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E028 OF 2024  
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA  
JULY 18, 2025**

**BETWEEN**

**MWANALIMA MWINYIKAI ..... APPLICANT**

**AND**

**ELEPHANT OILS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MAVJI KARSAN HIRANI ..... 2<sup>ND</sup> RESPONDENT**

**STEPHEN NJENGA NJOROGE ..... 3<sup>RD</sup> RESPONDENT**

**SALIM ALI NYAMA ..... 4<sup>TH</sup> RESPONDENT**

**KWALE COUNTY REGISTRAR ..... 5<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

*(Being an appeal against the Ruling of the Environment and Land Court of Kenya at Kwale (A. Dena, J.) delivered on 11th March 2024 in ELC No. 101 of 2021)*

**RULING**

1. Mwanalima Mwinyikai, the applicant, filed the present application before us dated 20<sup>th</sup> March 2024. The application is brought under Order 42 rule 6 of the Civil Procedure Rules, 2010 section 1A and 1B of the *Civil Procedure Act* and Articles 48 and 50(2) of *the Constitution*. The relevant unspent prayers in the application that the applicant seeks are: that the Court issues an order of stay of execution of the judgement and/or orders given on 11<sup>th</sup> March 2024 in Mombasa ELC Case No. 101 of 2021 pending hearing and determination of the appeal; and for costs of the application.
2. The proceedings by the applicant were triggered by the impugned ruling of Dena, J. dated and delivered on 11<sup>th</sup> March 2024. The ruling was the subject of two applications dated 4<sup>th</sup> October 2023 and 24<sup>th</sup> November 2023 respectively filed by the applicant. In the application dated 4<sup>th</sup> October 2023, the



- applicant sought orders to set aside, vary, review and/or discharge the consent orders recorded on 9<sup>th</sup> March 2022 and the Decree issued on 30<sup>th</sup> May 2022, and for an order that the case be re-opened for hearing.
3. In the application dated 24<sup>th</sup> November 2023, the applicant sought an interlocutory injunction against Elephant Oils Limited, Stephen Njenga Njoroge, Mavji Karsan Hirani, Salim Ali Nyama, Kwale County Land Registrar and the Attorney General (the respondents), or through their agents from entering into, occupying, constructing on, developing, selling, transferring, charging, mortgaging or in any manner whatsoever and howsoever interfering with all that portion of land measuring approximately 2.8 Ha known as Kwale/Galu Kinondo/351 of Map Sheet No. 2 and its subdivisions Kwale/Galu Kinondo/1713 to 1760 situated at Diani (the suit property).
  4. In her supporting affidavit, the applicant contended that she was one of the registered owners and legal beneficiaries of the suit property together with Salim Ali Nyama, the 4<sup>th</sup> respondent, having inherited it from their fathers pursuant to issuance to them and confirmation of grant of letters of administration on 9<sup>th</sup> February 2015 vide Kwale Kadhi Court Succession Cause No. 41 of 2015 in respect of the estates of Mwinyikai Bakari Kiriwacho and Ali Ramadhan (deceased), who were the first registered owners of the suit property; that Mavji Karsan Hirani, the 3<sup>rd</sup> respondent, who is a sibling of the 4<sup>th</sup> respondent, has also been living on the suit property; that she was aggrieved that the effect of the consent order of 9<sup>th</sup> March 2022 was to lock her and the 4<sup>th</sup> respondent out of the court proceedings, yet she did not participate in recording the said consent; and that she had filed an application dated 4<sup>th</sup> October 2023 to set aside the consent order on account of fraud, but which application is yet to be heard by the trial court. She was further apprehensive that Elephant Oils Limited, the 1<sup>st</sup> respondent, was about to evict her and other family members who reside on the suit property.
  5. In respect of the application dated 4<sup>th</sup> October 2023, the 1<sup>st</sup> respondent filed a Preliminary Objection dated 17<sup>th</sup> October 2023, Grounds of Opposition dated 18<sup>th</sup> October 2023 and a replying affidavits sworn on 2<sup>nd</sup> October 2023 and 25<sup>th</sup> October 2023 respectively, the gist of which was that the application dated 4<sup>th</sup> October 2023 was res judicata. The 1<sup>st</sup> respondent contended that the applicant and the 4<sup>th</sup> respondent sold the suit parcel to the 2<sup>nd</sup> respondent using a fake title; that the court in Commercial Suit No. 136 of 2014 directed Kwale County Registrar, the 5<sup>th</sup> respondent, to cancel the title and that, therefore, the title to the suit property does not exist; that the application for review was filed 1 year and 7 months down the line, and no explanation for the delay was given; and that the applicant's application dated 28<sup>th</sup> February 2022 filed in this Court, being Civil Application No. E011 of 2022 seeking extension of time to file the Notice and Record of Appeal out of time was dismissed.
  6. The 1<sup>st</sup> respondent further contended that there was no error apparent on the face of the record to justify review of the consent order as the amended defence and counterclaim dated 24<sup>th</sup> February 2020 filed by the applicant and the 4<sup>th</sup> respondent was struck out vide a ruling dated 20<sup>th</sup> May 2021, which discharged both of them from the proceedings.
  7. By a ruling dated 20<sup>th</sup> May 2021, the learned Judge (Yano, J.) dismissed the applicant and the 4<sup>th</sup> respondent's application dated 2<sup>nd</sup> October 2020 which sought to amend their defence and counterclaim. The learned Judge observed that the applicant and the 4<sup>th</sup> respondent having been discharged from the proceedings, paved way for the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents to file the consent dated 9<sup>th</sup> March 2022 in terms of the amended plaint dated 1<sup>st</sup> October 2019.
  8. The trial court further observed that the decision of P. J. Otieno, J. delivered on 20<sup>th</sup> July 2018 in Mombasa HCCC No. 136 of 2014 over the same subject matter, was never appealed against and remained a valid and binding decision of the court; that the review application before her was overtaken



by events; and that, as a result, she was not seized of jurisdiction to hear and determine the application. In the end, the application dated 4<sup>th</sup> October 2023 was dismissed and, having pronounced herself thus, she found it unnecessary to delve into the application dated 24<sup>th</sup> November 2023 which she also dismissed on the same ground and given in the same ruling.

9. Back to the instant application, the applicant's grounds in support, which are replicated in the supporting affidavit sworn by her on 20<sup>th</sup> March 2024, deposes that she was willing to abide by the terms that this Court may set with respect to deposit of security pending the hearing and determination of the appeal. The applicant further annexed a draft memorandum of appeal also dated 20<sup>th</sup> March 2024, which raises 10 grounds of appeal, and in which it is deposed that, absent of this Court's intervention in the interim, there is likelihood that the intended appeal will be rendered nugatory.
10. The 1<sup>st</sup> respondent, through its director, Ravi Kohli, deposed a 33 paragraphed replying affidavit sworn on 16<sup>th</sup> April 2024 opposing the application. The 1<sup>st</sup> respondent mainly emphasised that Plot No. Kwale/Galu Kinondo/351 ceased to exist after it was subdivided into 48 parcels, all registered in its name; that the grounds of appeal in the draft memorandum of appeal do not arise from the ruling of 11<sup>th</sup> March 2024; and that, for this reason, the appeal is not arguable. The 1<sup>st</sup> respondent refuted the allegations that the applicant and her family reside on the suit property. More critically, it posited that the applicant ceased to be a party to the suit before the trial court the moment her statement of defence and counterclaim was struck out vide the ruling dated 20<sup>th</sup> May 2021 against which no appeal had been preferred; that, further, on 14<sup>th</sup> December 2021, the superior court issued directions discharging the applicant and the 4<sup>th</sup> respondent as parties to the suit; and that, likewise, no appeal had been preferred against that order. Accordingly, we were urged to dismiss the application with costs.
11. In a supplementary affidavit dated 25<sup>th</sup> April 2024, the applicant challenged the way the 1<sup>st</sup> respondent obtained the title to the suit property, and contended that it was through fraudulent means; that the superior court failed to appreciate the particulars of fraud raised in the defence and counterclaim, which ultimately render this appeal necessary.
12. We heard this application on 18<sup>th</sup> February 2024. In attendance were learned counsel Ms. Chesaro for the applicant and learned counsel Mr. Khanna for the 1<sup>st</sup> respondent. The rest of the parties did not attend court despite having been duly served with hearing notices.
13. Ms. Chesaro highlighted the applicant's written submissions dated 25<sup>th</sup> April 2024. She submitted that the stay is against the execution of the ruling dated 11<sup>th</sup> March 2024, the consent judgement recorded on 9<sup>th</sup> March 2022 and the decree issued on 30<sup>th</sup> May 2022; that, although the applicant seeks stay of execution in respect of the suit property which she claims to be in possession of, the same has since been subdivided by the 1<sup>st</sup> respondent; that she (The applicant) stands to suffer substantial loss since she and her family have been living on the property for 50 years; and that the denial of an opportunity to be heard, especially as regards to fraudulent transactions relating to the title, will render the appeal nugatory.
14. On the part of the 1<sup>st</sup> respondent, Mr. Khanna highlighted the submissions dated 26<sup>th</sup> April 2024, contending that the original title to the suit property was pronounced as fake vide court proceedings in ELC No. 101 of 2021 and HCCC No. 136 of 2014; that the suit property was then subdivided into 48 parcels and that, consequently, the applicant and the 4<sup>th</sup> respondent have no locus standi to institute proceedings before this Court. We were urged to dismiss the application with costs.
15. We have considered the application, the respective supporting and replying affidavits, the written and oral submissions by both parties and the law.



16. The applicant is asking us to exercise our discretion to grant stay orders against the ruling of the trial court dated and delivered on 11<sup>th</sup> March 2024. At the outset, we make an observation that, although the applicant correctly seeks an order of stay of execution, the application is brought under the provisions of Order 42 rule 6 of the Civil Procedure Rules, 2010 which Rules are not applicable to this Court. A party seeking stay of execution orders before this Court has to invoke this Court's Rules with the relevant rule being 5(2) (b).
17. The principles which a court considers under Order 42 Rule 6 before granting stay of execution are different from the conditions which this Court considers before granting stay of execution or of proceedings, or an injunction, under rule 5(2) (b). Rule 5(2) (b) mandates us to consider what is now commonly referred to as the twin principles, namely whether the intended appeal is arguable, and whether the appeal is likely to be rendered nugatory absent stay.
18. Having perused the application, the applicant has attempted to demonstrate the twin principles under rule 5(2) (b) albeit the application being founded on incorrect provisions of the law.
19. The ruling of the trial court dismissed the applicant's applications dated 4<sup>th</sup> October 2023 and 24<sup>th</sup> November 2023. Thus, upon dismissal, there was no requirement of any person to do, or refrain from doing, anything or taking any step. In essence, the resultant order of the trial court was a negative order.
20. In *Western College of Arts and Applied Sciences vs. EP Oranga & 3 others* (1976) KECA 15 (KLR), this Court had the following to say with regard to negative orders:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”
21. In *Republic vs. Kenya Wildlife Service & 2 Others* (2007) KECA 26 (KLR) this Court held:

“Lastly, it would appear to us that we have no jurisdiction to grant any order for injunction or stay in the terms sought or at all for the reason that Aluoch J. neither granted nor refused the application for stay. The superior court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore, no positive and enforceable order made by the superior court which can be the subject matter of the application for injunction or stay. Prima facie, the superior court has not ordered any party to sign the lease. The application for injunction or stay is apparently extraneous to the orders made by the superior court.”
22. In view of the foregoing, it follows that, the trial court having dismissed the applications that are subject of the impugned ruling consequent to which the order arising therefrom is negative, we are bereft of discretionary power to grant the orders sought. That is to say that there is nothing arising from the impugned ruling for this Court to stay. In the result, the Notice of Motion dated 20<sup>th</sup> March 2024 is devoid of merit and is hereby dismissed with costs to the 1<sup>st</sup> respondent.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF JULY, 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**

