



**Muhsin v Registrar of Titles & 3 others (Civil Appeal (Application) E108 of 2022) [2024] KECA 177 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KECA 177 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E108 OF 2022  
P NYAMWEYA, KI LAIBUTA & GV ODUNGA, JJA  
FEBRUARY 23, 2024**

**BETWEEN**

**ABDULKARIM SALEH MUHSIN ..... APPELLANT**

**AND**

**THE REGISTRAR OF TITLES ..... 1<sup>ST</sup> RESPONDENT**

**THE NATIONAL LANDS COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**THE KENYA REVENUE AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

*(An application for stay of execution pending appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (N. A. Matheka, J.) delivered on 26th October 2022 in ELC Petition No. 12 of 2019)*

**RULING**

1. The Applicant herein, Abdulkarim Saleh Muhsin, filed a Notice of Motion application in this Court dated 27<sup>th</sup> June 2023, which is stated as being brought pursuant sections 1A, 1B & 3A of the Civil Procedure Act, Order 42 rule 6(1) & (2), Order 51 of the Civil Procedure Rules, 2010 and sections 3 & 13 of the Environment and Land Court Act. The application is seeking an order of stay of execution of the judgment and decree passed on 26<sup>th</sup> October 2022 in Mombasa ELC Petition No 12 of 2019 pending hearing and determination of his intended Appeal against the said judgment. The application is supported by the grounds on the face of the motion, and a supporting affidavit sworn on even date by the Applicant. In response, the 3<sup>rd</sup> Respondent filed a Replying Affidavit sworn on 27<sup>th</sup> November 2023 by one of its officers, Simon Mwaniki. The other Respondents did not file any pleadings in response.



2. We heard the application on the Court’s virtual platform on 28<sup>th</sup> November 2023 when learned counsel Ms. Philip appeared for the Applicant, and learned counsel Mr. Philip Wairire appeared for the 3<sup>rd</sup> Respondent, and also held brief for learned counsel Ms. Winnie Waswa for the 1<sup>st</sup> and 4<sup>th</sup> Respondents. There was no appearance for the 2<sup>nd</sup> Respondent despite due service of the hearing notice on its advocates. Ms. Philip and Mr. Wairire briefly highlighted their written submissions dated 20<sup>th</sup> November 2023 and 27<sup>th</sup> November 2023 respectively.
3. We note that the Applicant relied on the provisions of the Civil Procedure Act and Rules, and the Environment and Land Court Act, when presenting his application, which do not apply to this Court. While we had the option of striking out the application for being incompetent on this ground, we were nonetheless persuaded to consider it in the interests of substantive justice after noting that the Applicant’s and the 3<sup>rd</sup> Respondent’s counsel cited and relied on the correct provisions of the law in their submissions, namely rule 5(2) (b) of the Court of Appeal Rules, and the decisions thereon in Trust Bank Limited & another v Investech Bank Limited & 3 others [2000] eKLR; and County Secretary County Government of Busia v Manwari & Co. Advocates [2021] eKLR.
4. The applicable principles in the exercise of the Court’s unfettered discretion under rule 5(2) (b) of the Court of Appeal Rules, 2022 to grant an order of stay are well settled. Firstly, an applicant has to satisfy that he or she has an arguable appeal. Secondly, an applicant has to demonstrate that, unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in Stanley Kangethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR. It is essential to point out that an arguable appeal is not one which must necessarily succeed, but one which is not frivolous and merits to be argued fully. Further, it is sufficient if the appeal raises only one triable issue. On the nugatory aspect, it was held in Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others (*supra*) that, whether or not an appeal will be rendered nugatory, depends on whether or not what is or ought to be stayed or restrained by way of injunctive relief, if allowed to happen, is reversible; or if not reversible, whether damages would reasonably compensate the aggrieved party. We are also guided by the observations made in Reliance Bank Limited v Norlake Investment Limited (2002) 1 EA 227 that factors which render an appeal nugatory are to be considered within the circumstances of each case and, in so doing, the Court is bound to consider the conflicting claims of both sides.
5. What then are the parties’ respective cases and arguments on these requirements? On the first limb of an arguable appeal, the Applicant averred in his affidavit that that he has filed Civil Appeal No E108 of 2022 against the judgment delivered in Mombasa ELC Petition No 12 of 2019, which dismissed his petition in which he had sought various prayer, including orders to preserve the suit property, being LR. No. MN/1/3092 and preserve his proprietary rights therein. He claimed that his appeal was arguable, but did not indicate in what respect. In the submissions, and while citing the decision in Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 others (*supra*), the Applicant’s counsel urged that that the Applicant had an arguable appeal premised on the grounds outlined in their memorandum of appeal dated 7<sup>th</sup> November 2022. The said memorandum of appeal was not annexed to the Notice of Motion application, but we managed to retrieve it from the Record of Appeal that has been filed in Civil Appeal No E108 of 2022 . There are four grounds raised therein challenging the trial Court’s findings on the indefeasibility of the Applicant’s title, contravention of his right to fair administrative action, and that the suit land was public land.
6. The 3<sup>rd</sup> Respondent pointed out in its response that the application made no attempt to substantiate the claim that they had an arguable appeal and, while pointing out that the suit property was public land, appeared to concede that “the Applicant’s appeal to the Court of Appeal was limited to whether the piece of paper they held amounted to good title”. We have considered the respective pleadings and



arguments by the parties herein, and are persuaded that the issue of the propriety of the Applicant's title to the suit property is arguable, and that his appeal is not frivolous. We therefore find that the first requirement for stay of execution has been demonstrated by the Applicant.

7. On the second limb as regards the question as to whether the appeal will be rendered nugatory if stay orders are not granted, the Applicant averred that the effect of the impugned judgment was to give the 3<sup>rd</sup> Respondent the right to claim ownership of the suit property, and that that its transfer was imminent leading to subsequent loss of ownership, which could not be capable of monetary compensation. The Applicant's counsel submitted further that the learned trial Judge condemned him to pay costs of the petition to the 3<sup>rd</sup> Respondent. Counsel relied on the holding in the case of *Kenya Hotel Properties Limited v Willesden Properties Limited*, Civil Application Nai No 322 of 2006 (UR 178/06) cited with approval in *Housing Finance Company of Kenya Limited v Sharok Kber Mohammed Ali Hirji & another* [2015] eKLR for the proposition that, in certain cases, undue hardship would be caused to the Applicant if stay is declined purely on grounds that the decree is a money decree.
8. On its part, the 3<sup>rd</sup> Respondent was categorical in its averments that the appeal will not be rendered nugatory for two reasons: firstly, that the suit property is public property and is therefore in no danger of being extinguished; and, secondly, that the Applicant has never had actual possession of the suit property, which has been in the possession of the 3<sup>rd</sup> Respondent and the Government of Kenya, and is used as staff quarters, and that the Applicant has not made any development and/ or any investment on the suit property that may be rendered unusable or lost if the stay orders were not granted.
9. We are persuaded that the appeal will not be rendered nugatory on account of the fact that the trial Court issued negative orders, dismissing the Applicant's petition, and therefore there is no positive action capable of being stayed. No evidence of the processes of execution of the order as to costs was also presented before us. We also note that the Applicant does not dispute the averment that the 3<sup>rd</sup> Respondent has been in possession of the suit property, and his apprehension is that the suit property will be transferred. It is our view that no irreparable prejudice will be suffered by the Applicant in this respect, since the suit property is public land and the 3<sup>rd</sup> Respondent is a public entity, if his appeal succeeds, there is the possibility of ownership of the property reverting to him.
10. We accordingly find that the Notice of Motion application dated 27<sup>th</sup> June 2023 is not merited, and is hereby dismissed with no order as to costs, in light of the fact that the subject-matter is public land.
11. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2024**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**



I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

