



**Salim v Muhaji & another (Civil Appeal (Application)
E037 of 2023) [2024] KECA 356 (KLR) (22 March 2024) (Ruling)**

Neutral citation: [2024] KECA 356 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E037 OF 2023
MSA MAKHANDIA, KI LAIBUTA & GV ODUNGA, JJA
MARCH 22, 2024**

BETWEEN

MOHAMED OMAR SALIM APPELLANT

AND

AMINA SHEYUMBE MUHAJI 1ST RESPONDENT

MOHAMED MAHFUDH 2ND RESPONDENT

*(Being an application for injunction pending appeal against the Ruling
and Orders of the Environment and Land Court of Kenya at Mombasa (S.
M. Kibunja, J.) dated 1st February 2023 in E.L.C. Case No. 246 of 2016)*

RULING

1. Coming for hearing before us is a Notice of Motion dated 6th May 2023 brought by the applicant, Mohamed Omar Salim, under rule 5(2) (b) of the Court of Appeal Rules praying for an injunction restraining the 1st and 2nd respondents from dealing with the property known as plot No. 2923 (Original 1365/2) Section MNCR No. 21868 (the suit property) pending hearing and determination of his appeal against the ruling and orders of the Environment and Land Court at Mombasa (S. M. Kibunja, J.) delivered on 1st February 2023 in ELC Case Nos. 246 and 363 of 2016; and an injunction restraining the National Land Commission from paying compensation in respect of all or any part of the suit property acquired by way of compulsory acquisition; and that the costs of the application be provided for.
2. We hasten to observe that the record as put to us does not contain any pleadings in the trial court or the impugned ruling to enable us comprehensively ascertain the factual background of the applicant's Motion other than what is otherwise discernible from the grounds set out on the face of the application. In the absence of such records, we are only left with the formal application, the affidavits in support and in reply thereto to inform our decision.



3. The applicant's Motion is supported by his annexed affidavit sworn on 6th May 2023 essentially deposing to the grounds on which the application is anchored, namely: that the applicant was a purchaser for value of a portion of the suit property from the 1st respondent (now deceased), who handed over the original title to the suit property in part performance of the transaction; that the title remains in the applicant's possession to-date; that, subsequently, the deceased purported to sell the suit property to the 2nd respondent without the original title; that the 2nd respondent instituted proceedings in ELC Case No. 246 of 2016 against the 1st respondent, but omitted the applicant as a party; that the 1st and 2nd respondents recorded a consent, which was adopted as judgment of the court (but whose terms are not disclosed in the Motion); that, on 5th March 2018, the applicant applied for orders to set aside the consent judgment, to be joined in the suit, and to have the suit consolidated with ELC Case No. 363 of 2016 filed by the applicant against the 1st respondent, 2nd respondent and the County Land Registrar; and that the trial court be pleased to set aside the consent judgment and order consolidation of the two suits.
4. Counsel for the applicant, M/s. Taib & Taib, filed written submissions and case digest dated 9th May 2023 citing 5 judicial authorities highlighting the principles required to be met in applications for orders under rule 5(2) (b) of the Court of Appeal Rules, which we have duly considered.
5. The applicant's Motion is opposed vide the 2nd respondent's replying affidavit sworn on 17th May 2023 stating that the Motion does not meet the conditions required for grant of orders under rule 5(2) (b); that the appeal has no chance of success; that the suits in the High Court have since abated; that an appeal cannot follow an abated suit; that the applicant seeks orders against the representatives of the 1st respondent's estate, who have not been joined in the proceedings; and that the applicant is unlikely to suffer any prejudice if the orders sought are not granted since he has never been in occupation of the suit property. He urges us to dismiss the applicant's Motion with costs.
6. In addition to the 2nd respondent's replying affidavit, the firm of M/s.K. A. Kasmani & Company filed written submissions and list of authorities dated 17th May 2023 citing 5 judicial authorities to which we have addressed ourselves.
7. It is common ground that the 1st respondent is long deceased, a fact that was disclosed to the trial court on 27th May 2020 when the two consolidated suits were stood over pending substitution of the deceased; that, on 9th June 2021, the court marked the two suits as having abated, but that the parties were at liberty to revive the suits; that the 1st respondent is yet to be substituted for in the proceedings and the suits revived; that the suit property has since been registered in the names of Habib Mohamed and Mohtu Mohamed (the beneficiaries to the deceased's estate) pursuant to letters of administration issued in Kadhi's Court Succession Cause No. E046 of 2022; that the said Habib Mohamed and Mohtu Mohamed are neither named nor joined in the two suits to substitute for the deceased 1st respondent in the proceedings; and that the National Land Commission is not party to the proceedings.
8. We agree with the 2nd Respondent's counsel that the suits as consolidated in the High Court do not exist as they were extinguished by abatement, and are no longer alive. Consequently, they are incapable of giving rise to an appeal. Indeed, on 9th June 2021, the court marked the two suits as having abated. As the High Court at Nairobi correctly observed in *Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others* [2018] eKLR –

“In the words of the cited case above this is an attempt to place something on nothing and expect it to retain ground. This cannot happen.



The estate of a deceased person may take over proceedings against him if that person were alive at the time the suit was filed. That notwithstanding, the estate must be made a party and authorized by the court through an executor or a personal representative. A formal application has to be filed to facilitate this. No grant of representation has been presented to court”

9. The deceased 1st respondent having been party to the consolidated suits in the High Court, and the suits having abated for want of substitution of the personal representatives of her estate, and the abated suits having not been revived, any attempt by the applicant to seek interlocutory orders pending determination of a non-existent appeal is in vain. Consequently, the applicant’s Notice of Motion dated 6th May 2023 is incompetent and is hereby struck out with costs to the 2nd respondent. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MARCH, 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

