



REPUBLIC OF KENYA



KENYA LAW
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**Cabinet Secretary Ministry of Defence v Mohamedali (Civil Application
E095 of 2023) [2024] KECA 367 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 367 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E095 OF 2023
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
APRIL 12, 2024**

BETWEEN

THE CABINET SECRETARY MINISTRY OF DEFENCE APPLICANT

AND

MAJMUDIN NOORALI MOHAMEDALI RESPONDENT

*(Being an application for stay of execution pending appeal from the
Judgment and Decree of the Environment and Land Court at Mombasa
(L. L. Naikuni, J.) delivered on 10th May 2023 in E.L.C. No. 10 of 2022)*

RULING

1. From the scanty record as put to us, the precis of the application before us is that the respondent, Majmudin Noorali Mohamed Ali, sued the applicant, the Cabinet Secretary Ministry of Defence, and 4 Others, in the Environment and Land Court at Mombasa in ELC Constitutional Petition No. 10 of 2022 seeking a whopping 10 prayers, which essentially challenged the compulsory acquisition of LR No. CR400/Plot No. 77/IV/MS and CR2117/Plot No. 81/IV/MS (the suit properties); and the respondent's contention that the owner thereof had been duly compensated.
2. In his petition (which is excluded from the record), the respondent sought declaratory orders to invalidate the purported gazettement of the compulsory acquisition; the purported compensation of the then deceased registered proprietor; and the resultant title Nos. Plot No. 227/IV/Mainland North and No. 229/IV/ Mainland North arising from the acquisition. In addition to the declaratory orders aforesaid, the respondent sought compensation by way of general, exemplary and aggravated damages in the total sum of KShs. 750,000,000; costs; interest and any other relief that the court considered appropriate to grant.
3. The respondent's petition was supported by his 39-paragraph affidavit, which is also excluded from the record. In summary as gathered from the impugned judgment, his case was that he was the registered



- proprietor of the suit properties; that the properties were compulsorily acquired by the Government of Kenya sometime in 2018 for use by the Department of Defence (Kenya Navy) as Mtongwe Rifle Range and Naval Dockyard Extension, Mombasa; that he was the sole beneficiary of the suit properties by way of transmission from his deceased mother, Dayambai Bhajjee, who died on 3rd January 1973; that the Department of Defence was unlawfully in occupation of the suit properties; that, upon his demand for compensation, he was informed through a copy letter dated 2nd February 2022 addressed to the Attorney General by the Cabinet Secretary Ministry of Lands and Physical Planning that the properties were compulsorily acquired in 1977 and 1978, and compensation duly paid to their “owner” in the sum of KShs. 41,089/25 in respect of plot No. 227/IV/MS and KShs. 63,997/50 in respect of plot No. 229/IV/MS; that the previous partitioning of the suit properties in 1960 was unlawful; that he, the respondent, still holds the original title documents to the suit properties; that no compensation has ever been made to him or to his deceased mother’s estate; and that he is lawfully entitled to compensation to the current value of the properties in the sum of KShs. 750,000,000.
4. Opposing the petition, the applicant and their co-respondents in the petition contended, inter alia: that the respondent herein had no capacity to seek compensation as claimed in the petition; that the suit properties did not comprise part of his deceased mother’s estate; that the suit properties did not exist by virtue of the fact that they had been subdivided and their respective title registers closed in 1960 upon compulsory acquisition of portions thereof and the remainder transferred to, and registered in the name of, third parties as far back as 1969, years before the demise of the respondent’s deceased mother in 1973; that compensation was paid to the rightful owners in 1977 and 1978; that, upon compulsory acquisition, the suit properties were vested in the Government in 1979; that the compulsorily acquired properties were consolidated into one parcel of land known as Mombasa/Mainland }South/Block 2/263 and a certificate of lease issued in favour of the Cabinet Secretary to the National Treasury as trustee for the Department of Defence; and that the respondent’s claim was barred by the statute of limitation by virtue of section 7 of the *Limitation of Actions Act*, having been brought more than 43 years after conclusion of the impugned compulsory acquisition.
 5. In its judgment delivered on 10th May 2023, the ELC (Naikuni, J.) allowed the respondent’s petition as prayed and ordered, inter alia, payment of compensation to the respondent in the sum of KShs. 750,000,000; KShs. 37,500,000 as general (exemplary/punitive) damages being 5% of the quantified damages; KShs. 350,000,000 for loss and suffering on the alleged unconstitutional and unlawful cancellation of the title documents transferred to the Government and subsequent actions; upon payment of compensation as aforesaid, surrender by the respondent of all original title deeds to the Government; costs of the suit; and interest at 14% per annum until payment in full.
 6. Aggrieved by the decision of Naikuni, J., the applicant and 4 other appellants moved to this Court on appeal on 2 grounds set out on the face of their undated draft memorandum of appeal, namely: that the learned Judge erred in fact and in law by finding that the parcels of land LR No. CR400/Plot No. 77/IV/MS and LR CR2117/Plot No. 81/IV/MS formed part of the respondent’s late parent’s estate and, therefore, available for transmission to him; and that the learned Judge erred in fact and law by failing to appreciate that the parcels of land aforesaid were duly, legally and procedurally acquired by the Government through compulsory acquisition, and compensation paid in that regard.
 7. In addition to the appeal, the applicant has also come before this Court by way of a Notice of Motion dated 17th October 2023 supported by the annexed affidavit of Patrick Mariru, the Principal Secretary in the Ministry of Defence, sworn on 18th October 2023 essentially deposing to the grounds on which the application is made.
 8. In his Motion, the applicant seeks orders to “... stay execution of the decree in Mombasa ELC No. 10 of 2022 ... pending hearing and determination of this application” and that “... costs be in the cause”.



9. It is noteworthy that the Motion is made pursuant, inter alia, to rule 5(2) (b) of the Court of Appeal Rules. It is anchored on 9 grounds set out on the face of the Motion. Relevant among them are, namely: that the intended appellant is yet to obtain the requisite copies of the proceedings of the ELC to enable him lodge the intended appeal; that the intended appeal is meritorious and raises substantial issues of law for hearing and determination with high degree of success; the intended appeal would be rendered nugatory and prejudicial to the applicant if the orders sought are not granted; that the respondent will not suffer any prejudice that cannot be compensated by damages if this application is allowed and the orders sought granted; and that, in the interest of justice and fairness, the application be allowed pending hearing and determination of the intended appeal.
10. In support of the applicant's Motion, the learned Special State Counsel for the applicant, Mr. Henry Muriithi Mugiira, filed written submissions dated 27th October 2023 citing cases of *Centre Star Limited & Husein Hassan Bood vs. Halima Mahmood Ali* (Suing in her capacity as the legal representative of the estate of Hawa Hassan Mohamud) (citation undisclosed); and Global Tours & Travel Limited (citation incomplete), submitting on the twin principles for grant of orders under rule 5(2) (b), namely: that the applicant must satisfy the court that the intended appeal is not frivolous; and that, unless the Court grants the orders sought, the appeal will be rendered nugatory.
11. The respondent opposed the applicant's Motion vide his "Grounds of Opposition" dated 6th November 2023, a procedural step known only to the Civil Procedure Rules that guide the courts below. Learned counsel for the respondent, M/s. Mugoye & Associates, filed written submissions and a list of authorities of even date. Counsel cited 5 judicial authorities, which include the case of *Wanja & Another vs. Roothaert* (Misc. App. No. E193 of 2021) [2022] KEHC10255 (KLR), submitting that this Court has no jurisdiction to entertain the applicant's Motion on the ground that it was made under the repealed 2010 Rules.
12. On the authority of *Mistry Premji Ganji (Investments) Limited vs. Kenya National Highways Authority* [2019] eKLR, counsel submitted that the memorandum of appeal and record of appeal were not filed pursuant to rule 84(1) and (2) of the Rules of this Court, which prescribes the timelines and procedural form in which appeals are lodged in this Court.
13. In addition to the foregoing, counsel places reliance on the case of *JK Industries vs. Kenya Commercial Bank Ltd & another* [1987] eKLR, submitting that there is no appeal before this Court, and that the applicant is restrained from alleging that he has an arguable appeal. With due respect to counsel, the remaining two authorities are of no value to the Motion before us, but that is not to say that the three mentioned above have any significant bearing on the requirements for grant of orders under rule 5(2) (b) of this Court's Rules, which is the primary concern of the Court in considering the nature of the application before us, and the nature and intent of that application.
14. In his Motion, the applicant prays mainly for "... stay of execution of the decree in Mombasa ELC No. 10 of 2022 ... pending hearing and determination of this application" and, apart from costs, no further interim relief is sought in the Motion.
15. That said, we fail to see what purpose stands to be served by the order sought. The main prayer sought in the Motion is essentially spent upon determination of the application. With all due respect, the applicant's Motion is misperceived, and is plainly characterised by misapprehension of the purpose for which rule 5(2) (b) of this Court's Rules is intended.
16. In view of the foregoing, we find that no useful purpose would be served by a pronouncement on the principles to be satisfied for grant of orders under rule 5(2) (b). To do so in the absence of an application



for appropriate orders under the Rules would serve no useful purpose. In conclusion, the applicant's Motion is incompetent and is hereby dismissed with costs to the respondent. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF APRIL 2024.

A. K. MURGOR

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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

