



**Hamadi & 149 others v Safaricom Investments Co-operative Society Limited & another
(Civil Appeal (Application) E026 of 2023) [2024] KECA 578 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 578 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL (APPLICATION) E026 OF 2023
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
MAY 24, 2024**

BETWEEN

KIBWANA HAMADI & 149 OTHERS APPLICANT

AND

**SAFARICOM INVESTMENTS CO-OPERATIVE SOCIETY LIMITED 1ST
RESPONDENT**

JOHN KIMOOGUT KIPTOO 2ND RESPONDENT

*(Being an application for stay of execution of the Judgment and/or Orders
of the Malindi Environment and Land Court (E. K. Makori, J.) delivered
on 26th April 2023 in Environment and Land Case No. 5 of 2022)*

RULING

1. By a Notice of Motion dated 7th December 2023 brought pursuant to rule 5 (2) (b) of the *Court of Appeal Rules*, Section 3A, 3B of the *Appellate Jurisdiction Act* and Article 159 of the (*Constitution of Kenya, 2010*) the applicants pray that, pending hearing of the appeal, this Court be pleased to grant stay of execution of the judgment of the Malindi Environment and Land Court delivered on 26th April 2023.
2. As a brief background to the application for stay of execution, the applicants claim that the dispute concerns parcels of land that initially belonged to one Salim Bin Hero and known as Plot No. 86 Section IV Mainland, which had 624 acres and a second parcel of land known as Sub-Division No. 284 Section 111 Mainland North measuring approximately 1590 acres (both referred to as the subject land). They claimed that, since time immemorial, they were in occupation of the parcel of land known as Sub-Division No. 284 Section 111 Mainland North, and that William Kiptoo Barkoria, the 2nd respondent's deceased father, had bought certain parcels of land without having any survey conducted, and that the parcels existed without deed plans. The applicants claimed to be in



undisturbed occupation of their portions of the land of about 94 acres, and that the beacons were intact and fell outside of the respondents' parcel of land; that they filed a suit in the High Court seeking *inter alia*: i) An order suspending three months' notice from the 25th of November 2021, which sought their eviction from title Number CR. 37354 pursuant to a sub-division registered as CR. 35955/3 situated North of Mombasa Municipality in Kilifi County measuring 4.047 Ha. or thereabouts and sub-division number 4379 (Original No. 563/1) Section III Mainland North as delineated on Land Survey Plan Number 252120 annexed to the Certificate of Title registered as CR. No 37354/1 and ii) an order of cancellation of the titles known as Title Number CR. 37354 pursuant to a sub-division registered as CR. 35955/3 situated North of Mombasa Municipality in Kilifi County measuring 4.047 Ha. or thereabouts and sub-division number 4379 (Original No 563/1) Section III Mainland North as delineated on Land Survey Plan Number 252120 annexed to the Certificate of Title registered as CR. No 37354/1 which was bought from the 2nd respondent and also plot number MN/III/6224 whose registered owner is the 2nd respondent being also a sub-division stemming from Plot No. 248 and all other subsequent sub-divisions.

3. In a defence, the 1st respondent disputed the applicants' assertions and filed a counterclaim against them seeking, *inter alia*, a declaration that it is the lawful owner of Title No. CR 35955/3 LR No 4379/111/MN, vacant possession, permanent injunction, and police supervision of the plaintiffs' compliance with orders of the court.
4. The 2nd respondent too filed a defence with a counterclaim seeking various orders ranging from a perpetual injunction, declaration of ownership of the suit property, and eviction of the applicants from the subject land enumerated in the counterclaim.
5. The trial Judge dismissed the applicants' claim and allowed the counterclaims by the respondents. The Court granted amongst other orders, an order of eviction against the applicants, and also ordered them to hand over vacant possession of the subject land.
6. The applicants were aggrieved by the trial court's decision and have preferred an appeal to this Court from which the Notice of motion for stay of execution arises. In the motion supported by the sworn affidavit of Kibwana Hamadi, it was contended that they will suffer irreparable and substantive loss in the event that execution is allowed to proceed before the appeal is heard; that they had filed an application for stay of execution pending appeal before the Environment and Land Court which was dismissed on 2nd November 2023; and that there is imminent threat that the respondents will proceed and execute the decree. They contend that the appeal raises fundamental questions of law and fact, and is therefore arguable as demonstrated by the grounds in the draft Memorandum of appeal, among them, that the learned Judge was in error in finding that the entire suit was grounded on adverse possession as a backbone and cause of action, and in failing to find that there was no partition of the land since no surveys demarcating the portions purchased by the respondents, so that no specific titles could be issued to the 2nd respondent's deceased father without participation of the other land owners; and that the court was wrong in finding that the 2nd respondent's deceased father acquired the land comprised in Title No. LR 563/III/MN being a subdivision of Plot No. 284; and that it is in the interest of justice and fairness that the order of stay sought be granted.
7. In a replying affidavit sworn on 8th January 2023, Agnes Anjao Bukachi, the legal officer of the 1st respondent opposed the application and deposed that the learned Judge rightly found that the applicants did not prove their claim of adverse possession and, therefore, had no interest in land parcel No. CR.35955/3 LR No.4379/111/MN; that they do not have an arguable appeal with any chances of success for the reasons that the 1st respondent purchased the subject property with vacant possession, a fact that was not contested by the applicants; that the invasion of the 1st respondent's property



commenced in 2018 when the applicants invaded the suit property and commenced developments; that they became hostile to the 1st respondent's members who attempted to visit the suit property; that, additionally, the trial court unequivocally found that the applicants made no "attempt to exactly point out what portion of the suit land the 149 Plaintiffs occupied."

8. It was further deponed that the applicants failed to establish that they are in possession of the subject land and that, therefore, they will not suffer any substantive loss if the order of stay of execution is not granted; that no evidence of the developments made on the suit property have been adduced to warrant this Court's exercise of discretion in favor of the applicants; that the applicants' appeal is without merit and is frivolous, based on misapprehension of the facts.
9. On his part, the 2nd respondent opposed the application by a replying affidavit sworn on 15th December 2023 in which he deposed that the applicants conceded that his deceased father William Kiptoo purchased the subject property, and that it was not true that the applicants have been in occupation of the subject land since time immemorial; that, as rightly conceded by the applicants, his deceased father bought 3 portions of L.R No. 284/III/MN measuring about 173 acres, which was duly registered as L.R No. 563/III/MN which vested in his name after succession; and that the applicants appeal is not arguable.
10. The deponent further averred that, after the judgment, some of the applicants sold or invited third parties to occupy the subject land with a view to defeating the ends of justice, and have continued to interfere with the subject land; that, if stay is granted, it is likely that more occupants may be brought onto the property thus complicating execution of the eventual decree of the trial court in his favour.
11. The parties filed written submissions, which they highlighted on a virtual platform during the hearing. On behalf of the applicants, learned counsel Mr. Mwambunya submitted that the draft Memorandum of appeal demonstrated that the appeal is arguable and, on the nugatory aspect, counsel submitted that the applicants' claim is based on possession and use; that the applicants have since time immemorial been in occupation of the parcel of land known as Sub-division No. 284 Section 111 Mainland North measuring approximately 1590 Acres and/or using portions of the land, having being born in the area and that their eviction from the parcel will render their appeal nugatory as their suit sought impeachment of the title and alternative prayers which sought to declare their eviction time-barred.
12. On their part, learned counsel for 1st the respondent, Mr. Wanjohi submitted that the grounds in the applicants' Memorandum of appeal where they contend that their suit was not based on adverse possession departed from their pleadings and submissions on adverse possession before the trial court; that, on this ground alone, their appeal was not arguable. It was further submitted that they have not proved that the appeal will be rendered nugatory as they do not reside on the subject land.
13. There was no appearance from the 2nd respondent despite having been served with the hearing notice.
14. The application for stay of execution is brought under rule 5(2) (b) of this [Court's rules](#). In so far as applications filed under rule 5(2) (b) are concerned, the threshold requirement to be satisfied are amplified in the case of *Republic v Kenya Anticorruption Commission and 2 others* [2009] eKLR thus:

"The court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, the appeal or intended appeal is not frivolous, that is to say, that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds their results or success could be rendered nugatory".



15. On the first criteria as to whether or not the applicants have established a valid basis for an arguable appeal, in the case of *Guardian Bank Limited v Book point Limited & Another* [2018] eKLR, the Court stated:

"Mindful, as we are, that an arguable appeal is not one that must necessarily succeed but simply one that is deserving of the Court's consideration, [See *Dennis Mogambi Mong'are v Attorney General & others* [2012] eKLR], we do not think that the issues identified by counsel for the applicant as summarized above are frivolous. There is for instance the question whether the amended decree on the basis of which execution against the applicant is sought is indeed a decree of the court.

16. The applicants' Memorandum of appeal specified 12 grounds. Central to the issues is the question of whether the trial court rightly found that the applicants had failed to prove their claim for adverse possession. Accordingly, the question that arises is whether the trial court properly evaluated the evidence before it, which issue is and of itself one that is arguable.

17. Turning to the second criteria as to whether the appeal would be rendered nugatory, this Court has held in several decisions that: "...whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or, if it is not reversible, whether damages will reasonably compensate the party aggrieved". See *Julius Wabinya Kang'ethe & Another v Mubia Muchiri Nga'ng'a* [2017] eKLR.

18. It is the applicants' case that they face a grave threat of eviction from their homes if the orders sought are not granted. They submitted that they are in occupation of the subject land and, if evicted, may not regain occupation. In effect, their apprehension is that, if their appeal were to succeed, they would have already been evicted thereby extinguishing the substratum of the appeal, which would in effect render the appeal nugatory.

19. For their part, although they assert that the applicants are not in occupation, the respondent's concern is that, if stay is granted, the applicants will continue developing portions of land or dispose of it to other third parties. We agree that, were this to happen, the very purpose of an order of stay will be defeated.

20. In the circumstances, we form the view that the applicants have satisfied the twin principles to warrant grant of stay of execution under rule 5(2) (b) of this *Court's rules* against the judgment of the Malindi Environment and Land Court delivered on 26th April 2023, but on condition that pending the hearing and determination of the appeal, there be no further developments or ceding of the subject land to third parties by the applicants.

21. Accordingly, we make the following orders:

- i. a stay of execution of the judgment and orders of the Malindi Environment and Land Court delivered on 26th April 2023 and is hereby granted pending hearing and determination of the intended appeal;
- ii. the status quo prevailing on the subject land to be maintained, meaning that the applicants do desist from undertaking any developments or ceding portions of the land to any third parties pending the hearing and determination of the appeal;
- iii. the applicants do file the record of appeal within the next 60 days from the date of this ruling; and
- iv. Costs be in the appeal.



It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCI Arb.

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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

