



Said v Schiering; Heiduk & another (Interested Parties) (Civil Application E076 of 2024) [2024] KECA 1286 (KLR) (27 September 2024) (Ruling)

Neutral citation: [2024] KECA 1286 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E076 OF 2024
KI LAIBUTA, GWN MACHARIA & DK MUSINGA, JJA
SEPTEMBER 27, 2024**

BETWEEN

NEREAH MICHAEL SAID APPLICANT

AND

THOMAS SCHIERING RESPONDENT

AND

GERHARD HEIDUK INTERESTED PARTY

JOHAN EHRGATNER INTERESTED PARTY

(Being an application under rule 5(2) (b) of the Court of Appeal Rules for stay of execution of, and pending appeal from the Judgment and Decree of the Environment and Land Court at Kwale (A. E. Dena, J.) dated 12th April 2024 in ELC Case No. 144 of 2021)

RULING

1. The matter came up for hearing of the applicant’s Notice of Motion dated 26th June 2024 against the respondent. It is brought under sections 3A and 3B of the [Appellate Jurisdiction Act](#) and rule 5(2) (b) of the [Court of Appeal Rules, 2022](#). The applicant seeks that the Court do issue: a stay of execution of the Judgment delivered on 12th April 2024 in ELC No. 144 of 2021-Thomas Schiering v Nereah Michael Said, Gerhard Heiduk & Wolfgang Georg Johan Ehgartner pending the hearing and determination of the intended appeal; an injunction restraining the respondent from constructing on, developing, leasing, disposing off and/or renting out the properties named as: Kwale/Kinondo/2458 and Kwale/Kinondo/2459, pending hearing and determination of the intended appeal; an injunction restraining the respondent from sponsoring and/or facilitating malicious publication in the mainstream and social media about the impugned judgment or this matter pending the hearing and determination of the intended appeal; and that costs be provided for.



2. The application is supported by the grounds on its face and supporting affidavit of the applicant sworn on even date.
3. In opposition to the application, the respondent filed a replying affidavit sworn on 6th July 2024.
4. Both parties filed written submissions dated 9th September and 13th September 2024 respectively. It suffices to state that brief oral highlights to the submissions were also made. Present in Court were learned counsel Mr. Abidha Nicholas for the applicant and learned counsel Ms. Mukoya for the respondent. We heard the counsel virtually via this Court's GoTo virtual platform.
5. Upon considering the respective rival submissions, it became apparent that the original suit land namely Kwale/Kinondo/755 was subdivided into 3 parcels of land, one of which is Kwale/Kinondo/2460. It is undisputed that the applicant has since sold the latter parcel, and that the titles to the other two parcels of land, namely Kwale/Kinondo/2458 and Kwale/Kinondo/2459 are currently deposited with the trial court pending hearing and determination of Civil Appeal No. E127 of 2024.
6. Whereas the applicant had no objection to the two titles remaining in the custody of the trial court and that a status quo order be issued pending the hearing and determination of the intended appeal, the respondent's counsel urged that, in addition, this Court orders that the respondent deposits the sale proceeds of LR Kwale/Kinondo/2460. We sought to know from counsel for the applicant whether he had any objection to the deposit of the proceeds of sale of the said plot, being 122,000 Euros, and counsel stated that the only amount that the applicant was willing and ready to deposit as security was Kshs.100,000.
7. In view of the foregoing, and mindful of the interest of justice in the circumstances of this case, we hereby order and direct as follows:
 - a. That execution of the judgment and decree delivered on 12th April 2024 in Kwale ELC No. 144 of 2021 be stayed pending hearing and determination of the appeal;
 - b. That an injunction do issue restraining the respondent from selling land parcel Nos. Kwale/Kinondo/2458 and Kwale/Kinondo/2459;
 - c. That the two orders above are conditional to the title deeds to the two parcels of land, namely Kwale/Kinondo/2458 and Kwale/Kinondo/2459 and half of the proceeds of sale of parcel No. Kwale/Kinondo/2460, in the sum €61,000 being deposited with the trial court within thirty (30) days from the date hereof;
 - d. That in default of the deposit of the sums aforesaid, execution do issue to recover the sum of €61,000;
 - e. That parties do fast track the hearing of the intended appeal; and
 - f. That the costs of this application shall be in the appeal.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF SEPTEMBER, 2024.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

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

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

