



**Abdulla v Makumu & another; Herkenrath & another (Affected Party) (Civil Appeal (Application) E049 of 2024) [2024] KECA 1473 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1473 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E049 OF 2024  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
OCTOBER 25, 2024**

**BETWEEN**

**JAFFARALI KASSAM ABDULLA ..... APPLICANT**

**AND**

**PAULINE MUTHEE MAKUMU ..... 1<sup>ST</sup> RESPONDENT**

**KILUNGU JUSTUS MULI ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**URSULA KRESZENNTIA MONIKA HERKENRATH ..... AFFECTED PARTY**

**PETER JURGEN HERKENRATH ..... AFFECTED PARTY**

*(An appeal from the Judgment and decree of the Environment and Land Court at Mombasa (A. Omollo, J.) dated and signed at Busia on 23rd September 2019 and delivered at Mombasa by (C. Yano, J.) on 7th October 2019 in Mombasa ELC Case No. 388 of 2010)*

**RULING**

1. The applicant, Jaffarali Kassam Abdulla, brought this Notice of Motion dated 11<sup>th</sup> April 2024 pursuant to rule 5(2) (b) of the [Court of Appeal Rules](#) and sections 1A, 1B and 3A of the [Civil Procedure Act](#), seeking inter alia that:
  - a. Pending the hearing and determination of this appeal the Court be pleased to order stay of registration of the Respondents as proprietors of the suit property in execution of the orders given on 24<sup>th</sup> January 2024.
  - b. The costs of this application be in the appeal.



2. The applicant's Motion is brought on several grounds set out on its face in that: the appeal has overwhelming chances of success because, as set out in the Memorandum of appeal, the applicant is challenging the award of special damages of Kshs. 53,000,000 that has subsequently been conceded by the respondents following their admission that the amended Plaintiff did not contain a prayer for special damages; that the court below directed the Deputy Registrar to execute the transfer of Plot sub-division No. 2444 (Original Number 1938/1) Section 1 Mainland North (the suit property) to the respondents, who have demanded the original Certificate of Title to facilitate registration of the transfer into their names and that, in the event the registration is effected, this appeal will be rendered nugatory.
3. The application is supported by the affidavit of the applicant in which he reiterates the grounds on the face of the application and further deposes that, after the judgment was delivered, the applicant sought a stay of execution of the orders; that as a condition for stay of execution pending the filing, hearing and determination of this appeal, the Environment and Land Court had directed the appellant to put in place a security for Kshs. 53,000,000 which had been awarded as special damages; that, dissatisfied with that conditional stay ordered by the trial judge, the applicant filed a motion in this Court to wit Civil Application No. E15 of 2020 under rule 5(2) (b) of the Court of Appeal rules seeking stay of execution pending hearing and determination of the appeal, but without having to deposit Kshs. 53,000,000. The application was dismissed (W. Ouko (P) (as he then was), W. Karanja and S. Gatembu Kairu, FCI Arb, JJ.A.) on 19<sup>th</sup> March 2021 as this Court held that the condition of stay pursuant to the deposit of a security of Kshs. 53,000,000 was not unreasonable as well as on the further ground of delay.
4. It was contended that, thereafter, his advocates had filed a Preliminary Objection against the respondents' Bill of Costs and, in particular, the costs on special damages of Kshs. 53,000,000; that in their reply, they expressly admitted that the amended Plaintiff did not contain a prayer for special damages and that, therefore, they conceded part of the appeal. It was asserted that, since the should not have been awarded and that, consequently, it should not have been a condition for him to deposit the amount as security in order for the stay of execution orders sought to be granted; that the suit property is in eminent danger of disposal to the respondents and this appeal will be rendered nugatory unless the orders sought are granted; and that the respondents will not suffer any prejudice if the suit property is preserved under the doctrine of *lis pendens* pending the hearing and determination of this appeal.
5. In their Grounds of opposition dated 16<sup>th</sup> April 2024, the 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the application on the grounds that: the application is misconceived, bad in law and an abuse of the process of the court; there is no appeal preferred by the applicants challenging the order of the Environment and Land Court issued on 24<sup>th</sup> January 2024; and that the jurisdiction of this Court under rule 5(2) (b) has been exhausted as the issue is now *res judicata*.
6. In their written submissions, learned counsel for the applicant Mr. Kinyua Kamundi reiterated the averments in the motion and affidavit in support, but submitted that no Notice of appeal had been filed in respect of the ruling or order issued on 24<sup>th</sup> January 2024. On *res judicata*, it was submitted that since the respondents have conceded that they did not plead for special damages of Kshs. 53,000,000, the requirement that the applicant deposit the amount as security ought not to remain as the basis upon which the orders of stay of execution should be granted. In respect of the threshold requirements for grant of orders of stay of execution, counsel submitted that the applicant has set out 25 grounds in his Memorandum of appeal that are arguable and not frivolous.
7. On their part, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents Ms. Umara submitted that there is no Notice of appeal filed against the orders dated 24<sup>th</sup> January 2024; and that, further, this Court having



dismissed a similar application under rule 5(2) (b), this application is *res judicata* and an abuse of the court process.

8. As a brief background to the motion, the respondents filed a suit against the applicant seeking:
  - i) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> defendants (not named in the appeal) acted in contempt of court when they sold and transferred the suit property to the applicant;
  - ii) A declaration that the sale and transfer of the suit property was in breach of a fiduciary duty owed to the respondents by the 1<sup>st</sup> and 2<sup>nd</sup> defendants;
  - iii) A declaration that the sale and transfer of the suit property by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to the applicant dated 26<sup>th</sup> June 2012 is null and void;
  - iv) An order of cancellation of the transfer dated 26<sup>th</sup> April 2012 and the entry over the suit property;
  - v) An order for specific performance of Deed of Agreement dated 27<sup>th</sup> October 2003 and a mandatory injunction compelling the 1<sup>st</sup> and 2<sup>nd</sup> defendants, within 30 days of the order, to perform their obligations under the agreement by executing a transfer of half share of the suit property, and to perform every other act and avail every other document required by the respondents, Lands office and any other authority for prompt and effective registration of the respondent's half share of the suit property to the respondents as equal shareholders;
  - vi) A declaration that the threat or intended eviction is in breach of the Deed of Agreement, trespass to land and goods, illegal and unlawful;
  - vii) An injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the applicant by themselves, their servants or agents from evicting the respondents from the suit business premises, removing their goods, locking and obstructing her customers access to the business premises, or interfering with her quiet occupation of the business premises known as Petuscha Guest House or selling, charging, or otherwise disposing of any interest in the suit property; and
  - viii. An order for compensation of the value of the buildings, fixtures and movables destroyed by the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants and the applicant jointly and severally.
9. On 23<sup>rd</sup> September, 2019 judgment was entered for the respondents as prayed in the Plaint, and they were awarded compensation of Kshs. 53,000,000 for the demolished improvements by the applicant. The applicant was aggrieved and filed an application dated 29<sup>th</sup> November, 2019 before the Environment and Land Court, prior to filing an appeal, seeking orders of stay of execution pending an intended appeal to this Court. The Environment and Land Court partially allowed the application and gave a conditional stay of execution, conditional upon the deposit of KShs. 53,000,000 within 30 days from the date of judgment in a joint interest earning account in the joint names of counsel for the applicant and counsel for the respondents; that if the money was deposited, there was to be no registration of any disposition in the register of the suit property until the appeal is heard. However, if the money is not deposited, "...the applicant will have to pursue his appeal without the benefit of an order of stay of execution, and the plaintiffs will be at liberty to fully execute the decree."
10. Once again, the applicant was aggrieved by this decision and filed an application to this Court by way of Civil Application No. E15 of 2020 seeking stay pending appeal on the basis that he could not come



up with Kshs. 53,000,000. This Court upon considering the application, in a ruling dated 19<sup>th</sup> March 2019 dismissed the application and held that:

“In our view, the applicant’s conduct amounts to abuse of the court process which we cannot countenance. We hold the view that the terms of the conditional stay as ordered by the trial court were not unreasonable. We also note that this application was filed over one year after the impugned judgment was delivered and the applicant has had sufficient time to look for the security ordered by the ELC. In the circumstances we find this application devoid on merit and dismiss it with costs in the appeal.”

11. The applicant is again before us, this time seeking to vary this Court’s orders of 19<sup>th</sup> March 2019 for the reason that, in an order dated 24<sup>th</sup> January 2024, the 1<sup>st</sup> and 2<sup>nd</sup> respondents are alleged to have conceded that they did not include a claim for special damages for Kshs. 53,000,000 in their amended Plaint before the trial court and that, therefore, such amount ought not to be the basis of the conditional stay order of the Environment and Land Court.
12. We have considered the motion, the affidavit in support, the responses and the parties’ submissions, and find that the stay of execution orders that the applicant is seeking are incapable of being granted for the reason that, if indeed the judgment of the trial court have been varied by the orders of 24<sup>th</sup> January 2024, we would have expected the applicant to file a Notice of appeal in respect of that ruling or order emanating from such proceedings, and to have annexed the ruling or order to the instant motion seeking stay of execution. As it were, we have scrutinized the motion and cannot find any Notice of appeal or any ruling or order pointing to a variation of the trial court’s judgment. These are crucial documents for which this Court must have the benefit of reviewing in order to be adequately placed in a position in which to determine the motion. In his submissions, Mr. Kamundi informed us that the applicant did not file a Notice of appeal in respect of the ruling or order upon which he relies in seeking to have this Court vary its earlier decision.
13. In the case of *Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission & 4 others* SC Pet. No. 8 of 2014; [2015] eKLR the Supreme Court stated:

“What is the objective purpose of the Notice of Appeal? It serves the important role of informing the relevant parties to the suit, especially the successful litigants, that their gains may be cut short, or delayed. It signals the intention to pursue an appeal. It is only fair that the parties, in the light of their legitimate anticipation, should know within the shortest time possible, whether to rest their litigious poise. It is consistent with the general rule guiding the judicial process: “litigation must come to an end.”
14. In the case of *Morris Ngundo v Lucy Joan Nyaki & another* [2015] eKLR, this Court held that:

“This being an appellate court, its jurisdiction is invoked first by the filing of the Notice of Appeal. Once a Notice of Appeal is filed, it is as good as an appeal having been filed. Rule 2 of the Court of Appeal Rules defines an appeal to include an intended appeal. It is thus trite law and there is a plethora of case law to the effect that this Court’s jurisdiction is invoked by filing of a Notice of Appeal.”
15. Given that there is no Notice of appeal filed in respect of this motion, it becomes evident that we have no jurisdiction to determine it, as a consequence of which we must down our tools.
16. In sum, the Notice of motion dated 29<sup>th</sup> September 2023 is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.



It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 25<sup>TH</sup> DAY OF OCTOBER, 2024.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CARb, FCIArb.**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is the true copy of the original  
signed

**DEPUTY REGISTRAR**

