



**Solian Investment Limited v KSC International Limited in Receivership  
(Formerly Known as Kundan Singh Construction & 6 others (Civil Application  
E010 of 2024) [2024] KECA 1479 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1479 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION E010 OF 2024  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
OCTOBER 25, 2024**

**BETWEEN**

**SOLIAN INVESTMENT LIMITED ..... APPLICANT**

**AND**

**KSC INTERNATIONAL LIMITED IN RECEIVERSHIP (FORMERLY KNOWN  
AS KUNDAN SINGH CONSTRUCTION ..... 1<sup>ST</sup> RESPONDENT**  
**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**  
**REGISTRAR OF LANDS KILIFI ..... 3<sup>RD</sup> RESPONDENT**  
**REGISTRAR OF TITLES ..... 4<sup>TH</sup> RESPONDENT**  
**DISTRICT SURVEYOR KILIFI ..... 5<sup>TH</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**  
**BANK OF BARODA ..... 7<sup>TH</sup> RESPONDENT**

*(Being an Application for Injunction and/or a stay of execution of the  
Judgment and Decree of the Environment and Land Court at Malindi  
(J. O. Olola, J.) dated 19th October, 2022 in ELC No.22 of 2016)*

**RULING**

1. By a Further Amended Plaintiff dated September 5, 2016, the applicant, Solian Investment Limited, pleaded that the 1<sup>st</sup> respondent had unlawfully entered into its land, L.R No. 15351 CR 22091 North of Kilifi Creek measuring 4 Ha (the suit property), without its consent or knowledge and constructed a wall along the boundary of the suit property preventing the applicant from gaining access. According



to the applicant, the said 4 Ha fell within the boundaries of the 1<sup>st</sup> respondent's 14.2 Ha land, which had been unlawfully created through the purported allotment of land under a Settlement Scheme.

2. In its defence, the 1<sup>st</sup> respondent pleaded that it was the registered owner of parcel of land known as Mtondia/Roka/11, and that it was a stranger to any parcel of land known as Title No. 15351 CR 22091 North of Kilifi Creek measuring 4 Ha. It admitted to have only erected a wall around its own property.
3. The 2<sup>nd</sup> to 6<sup>th</sup> respondents pleaded that the parcel of land was not available for alienation to the applicant as the same comprised a settlement scheme carved out of the government land well before 1992 when the applicant's title was allegedly issued. They pleaded that Title No. 15351 CR 22091 was allocated through the Settlement Fund Trustees to squatters who were ordinarily residents on the land, and who complied with the terms and conditions of allocation and that, if such a title existed in the name of the applicant, the same was acquired illegally and was null and void and incapable of conferring any proprietary rights to the applicant.
4. In his judgment dated 19<sup>th</sup> October 2022, the learned Judge (J. O. Olola, J.) dismissed the applicant's suit with costs.
5. Aggrieved by the said decision, the applicant lodged, albeit out of time, a Notice of Appeal dated 3<sup>rd</sup> November 2022. The Notice was regularised by this Court (A. K. Murgor, JA.) on 8<sup>th</sup> March 2024.
6. In its Notice of Motion dated 8<sup>th</sup> April 2024, the applicant seeks orders that:
  1. Pending the hearing and determination of the intended appeal by the applicant against the Judgment and Order made by the High Court on 19<sup>th</sup> October, 2022 in ELC No. 22 of 2016 - Solian Investment Limited vs. KSC International Limited in Receivership, Chief Land Registrar, Registrar of Lands Kilifi, Registrar of Titles, District Surveyor Kilifi & Attorney General - there be a stay of execution and/or implementation of the said Judgment in any manner whatsoever.
  2. Pending the hearing and determination of the appeal by the applicant against the Judgment and Order made by the High Court on 19<sup>th</sup> October, 2022 in ELC No. 22 of 2016 - Solian Investment Limited vs. KSC International Limited in Receivership, Chief Land Registrar, Registrar of Lands Kilifi, Registrar of Titles, District Surveyor Kilifi & Attorney General- the respondents and their agents be restrained from transferring, charging, selling or dealing in any manner whatsoever with the property known as L.R No. Mtondia/Roka/11.
  3. Pending the hearing and determination of the appeal by the applicant against the Judgment and Order made by the High Court on 19<sup>th</sup> October, 2022 in ELC No. 22 of 2016 - Solian Investment Limited vs. KSC International Limited in Receivership, Chief Land Registrar, Registrar of Lands Kilifi, Registrar of Titles, District Surveyor Kilifi & Attorney General- the respondents and their agents be restrained from transferring, charging, selling or dealing in any manner whatsoever with the property known as L.R No. 15351 CR 22091 North of Kilifi Creek.
7. In support of the application, Azim Lalji Nurani, the applicant's director, swore an affidavit on 8<sup>th</sup> April 2024 in which he averred that the applicant is the registered proprietor of Title No. L.R No. 15351 CR 22091 North of Kilifi Creek, whose certificate of title was issued on 15<sup>th</sup> February 1999, and that it had been in occupation thereof until September 2015 when its surveyor discovered that the 1<sup>st</sup> respondent had trespassed onto the suit land and constructed a wall; that the surveyor established that the 1<sup>st</sup> respondent was in illegal occupation of the suit land, and that the property that the 1<sup>st</sup> respondent was claiming completely encompassed the applicant's land; that L.R No. Mtondia/Roka/11 claimed to



be owned by the 1<sup>st</sup> respondent originated from the Mtondia Roka Settlement Scheme; that L.R No. Mtondia/Roka/11 was allocated to some four squatters who sold it to the entity from which the 1<sup>st</sup> respondent allegedly acquired its title; that upon acquiring interest in the property, the 1<sup>st</sup> respondent charged it to the 7<sup>th</sup> respondent which subsequently placed the 1<sup>st</sup> respondent under receivership; that L.R No. Mtondia/Roka/11, being a settlement scheme, was not available for alienation and, therefore, the 1<sup>st</sup> respondent's title was null and void; that the manner in which the allotment was done to the four original allottees was unprocedural; that, notwithstanding the evidence that the allotment was unprocedural, the learned Judge dismissed the applicant's suit and affirmed the 1<sup>st</sup> respondent's title; that the learned Judge did not cancel the applicant's title No. 15351, LR 22091 North of Kilifi Creek, which pertains to the same property as the one allegedly owned by the 1<sup>st</sup> respondent; that, unless the decision is stayed, there is a possibility that the 1<sup>st</sup> respondent may sell, or the 7<sup>th</sup> respondent may proceed to realise its security, thus rendering the appeal nugatory; that the applicant will not have any recourse against the 1<sup>st</sup> respondent which is under receivership and is incapable of meeting any financial awards that may eventually be made; and that the appeal has good chances of success as evidenced by the exhibited draft memorandum of appeal.

8. In response to the application, the 1<sup>st</sup> respondent relied on the replying affidavit sworn by Kereto Marima, a Certified Insolvency Practitioner and the Receiver Manager of the 1<sup>st</sup> respondent sworn on 29<sup>th</sup> May, 2024 in which it was averred that the judgment and decree gave rise to a negative order that did not require any party to take any positive steps capable of being stayed in the manner sought in prayer 1; that there was no evidence of how the applicant became the proprietor of title number 15351 Land Reference Number 22091 North of Kilifi Creek; that the evidence tendered before the trial court, particularly that of the 2<sup>nd</sup> to 6<sup>th</sup> respondents, demonstrated that it was the applicant's title that was irregularly obtained; that the applicant admitted that it is not residing on or occupying their alleged land; and that there was clear and uncontroverted evidence on creation of the 1<sup>st</sup> respondent's title Mtondia/Roka/11.
9. In addition, it was averred that the applicant had not demonstrated that the intended appeal shall be rendered nugatory unless the orders sought herein are granted as it was admitted that the applicant's title was not cancelled or invalidated, and that no evidence has been presented to demonstrate that the suit property was at any danger of alienation; that the 7<sup>th</sup> respondent has not issued any statutory notice on the realization of the suit property; and that the application should be dismissed with costs for lack of merit.
10. When the matter was called out for virtual hearing before us on 4<sup>th</sup> June 2024, learned counsel, Mr. James Singh, appeared for the applicant, learned counsel, Mr. Wafula, appeared for the 1<sup>st</sup> respondent, learned counsel, Mr. Munga, appeared for the 1<sup>st</sup> to 6<sup>th</sup> respondents while learned counsel, Mr. Sanjeev Khagram appeared for the 7<sup>th</sup> respondent.
11. Mr. Singh relied on his written submission, which he briefly highlighted while Mr. Wafula relied on the 1<sup>st</sup> respondent's replying affidavit and addressed the Court orally. Mr. Khagram took a similar position as that of Mr Wafula while Mr Munga informed the Court that he was not opposed to the orders sought in the application.
12. In its submissions, the applicant cited the case of Canon Assurance (K) Ltd v Mwangi & 4 Others [2013] KECA 975, highlighting the principles that guide this Court in application for stay or injunction pending appeal; Gitirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR on what amounts to an arguable appeal; Attorney General v Okiya Omtata Okiya & Another [2019] eKLR; and George Otieno Gache & Another v Judith Akinyi Bonyo & 5 Others [2017] eKLR, explaining the circumstances that would render an appeal nugatory; and Naftali Ruthi Kinyua v



- Patrick Thuita Gachure & Another [2015] KLR, setting out the importance of the doctrine of *lis pendens* in preserving the suit property pending hearing and determination of the suit.
13. According to the applicant, the intended appeal, which raises triable issues, is at risk of being rendered nugatory if the injunction and/or stay of execution sought are not granted. The applicant identified as triable issues the questions: whether the 4 hectares held by the applicant under leasehold tenure could be allotted and engulfed in the 14 hectares of the purported unsurveyed Government land so as to confer freehold interests that were passed to the 1<sup>st</sup> respondent; whether Mtondia/Roka/II actually exist on the ground in light of the evidence adduced in form of the records kept by the land registry; whether two valid titles can be issued to two different persons over one land; and whether land acquired in a settlement scheme may be transferred by way of sale.
  14. Regarding the issue as to whether the intended appeal is likely to be rendered nugatory if it were to succeed absent stay, it was the applicant's position that, since the suit property is charged to the 7<sup>th</sup> respondent, which has placed the 1<sup>st</sup> respondent under receivership, should the 7<sup>th</sup> respondent proceed to dispose of the suit property, which it has control over, the applicant will be unable to recover both the suit property and the costs for the restoration thereof. On the other hand, it was contended that neither the 1<sup>st</sup> respondent nor the 7<sup>th</sup> respondent will be prejudiced if the orders sought are granted in view of the existing charge in favour of the 7<sup>th</sup> respondent. It was submitted that, based on the doctrine of *lis pendens*, dealing with a property that forms the subject matter of legal proceedings impedes the course of justice. In the applicant's view, it had satisfied the twin principles for the grant of the orders sought, and we were urged to grant them.
  15. In his oral address, Mr Wafula submitted that stay of execution may not be granted where what is sought to be appealed from is a negative order dismissing the applicant's case; that no arguable grounds of appeal have been placed before the Court; and that, since the property is charged, there are statutory processes that must be followed for it to be disposed of, and that there is no evidence of any threat or danger of its disposal. We were urged to dismiss the application.
  16. In his oral address seeking to have the application dismissed, Mr. Khagram relied on the case of *Bahati Women Company Limited v Stephen Karimi Muruga & 6 others* [2016] eKLR and submitted that there is nothing capable of being stayed in a negative order; that, in the absence of a draft memorandum of appeal, the Court cannot judge the intended appeal's arguability; that the application is premised on speculation since there is no evidence of an intended disposal of the suit property; that the applicant has never been in occupation of the suit property; and that it will be adequately compensated in damages in the event that its appeal succeeds since it has not been alleged that the 7<sup>th</sup> respondent is incapable of paying the damages.
  17. We have considered the application and the submissions made before us. The basis for the exercise of this Court's jurisdiction under rule 5(2) (b) of this Court's Rules have now been clearly crystallised by numerous case law emanating from this very Court. By way of illustration, we shall highlight a few. The exercise of this jurisdiction is original, independent and discretionary (see *Githunguri v Jimba Credit Corporation Ltd No (2)* (1988) KLR 838). It is a procedural innovation designed to empower the Court to entertain interlocutory application for the preservation of the subject matter of the appeal where one has been filed or is intended (see *Equity Bank Ltd v West Link Mbo Limited* [2013] eKLR. It only arises where the applicant has lodged a notice of appeal (see [\*Safaricom Ltd v Ocean View Beach Hotel & 2 Others Civil Application No. 327 of 2009\*](#) UR).
  18. The conditions to be met before a party can obtain relief under rule 5(2) (b) have also been enunciated in case law. These are that the applicant has to demonstrate that the appeal is arguable on the one hand and, on the other hand, that if the stay sought is not granted, the appeal/intended appeal, as the case



may be, will be rendered nugatory (see *Githunguri v Jimba Credit Corporation Ltd No (2) (supra)*). By the term “arguable”, it is not meant an appeal or an intended appeal that will succeed, but one which raises a bona fide issue worth of consideration by the Court (see *Kenya Tea Growers Association & Another v Kenya Planters Agricultural Workers Union*, Civil Application No. Nai. 72 of 2011 UR). An appeal need not raise a multiplicity or any number of such points, and a single arguable point is sufficient to earn an applicant such a relief (see *Damji Praji Mandavia v Sara Lee Household Body care (K) Ltd Civil Application No. Nai 345 of 2005 (UR)*). It is therefore trite that demonstration of one arguable point will suffice (see *Kenya Railways Corporation v Ederman Properties Ltd Civil Appeal No. Nai. 176 of 2012*; and *Alimohamed Musa Ismael v Kimba Ole Ntamorua & 4 others Civil Appeal No. Nai. 256 of 2013*.)

19. As for the second prerequisite requirement, an appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible or, if it is not reversible, whether damages will reasonably compensate the party aggrieved (see *Stanley Kangethe Kinyanjui v Tony Keter & 5 others Civil Appeal No. 31 of 2012*). Loss to the parties on both sides of the appeal plays a central role in the determination since it is what the Court must strive to prevent by preserving the status quo (see *Total Kenya Limited versus Kenya Revenue Authority Civil Application No. 135 of 2012*).
20. Both limbs must be demonstrated before a party can obtain a relief under rule 5(2) (b) (see *Republic v Kenya Anti- Corruption Commission & 2 others (2009) KLR 31*; *Reliance Bank Ltd v Norlake investments Ltd (2012) IEA 22*); and *Githunguri v Jimba Credit Corporation (supra)*.
21. It is contended that, in the absence of a draft memorandum of appeal, this Court is not in a position to gauge the arguability of the intended appeal. This Court addressed itself to the issue in *Somak Travels Ltd v Gladys Aganyo [2016] eKLR* where it held that:

“While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application.”

22. We do not subscribe to the position taken by the 1<sup>st</sup> and 7<sup>th</sup> respondents that, in all applications of this kind, the applicant must annex a draft memorandum of appeal. However, some grounds or intended grounds ought to be disclosed in order to enable the Court arrive at the determination whether or not the appeal or intended appeal is arguable and not frivolous. The demonstration of an arguable appeal may be by the memorandum of appeal where such memorandum has been filed, or by way of draft memorandum of appeal, or by simply setting out such grounds in the body of the application or of the supporting affidavit. Accordingly, we disagree with the argument that the absence of a draft memorandum of appeal renders the application unmerited.
23. In this case, the applicant intends to argue in the intended appeal, inter alia, that the learned Judge in arriving at the decision to affirm the 1<sup>st</sup> respondent’s title when the evidence from the land registry was to the contrary, and that the title held by the 1<sup>st</sup> respondent ought to have been found to be unlawfully issued in light of the existence of the applicant’s title. Those issues, in our view, are not frivolous. To the contrary, they are arguable.
24. As regards the second consideration, it was submitted by the 1<sup>st</sup> and 7<sup>th</sup> respondents that there is nothing to stay because the trial court dismissed the applicant’s suit, and that no positive order was granted. That is the correct position where the applicant only seeks stay of execution pending appeal or intended appeal (see *Western College of Arts and Applied Sciences v EP Oranga & 3 others [1976] eKLR*; and *Co- operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)*



[2015] eKLR). In this application, the applicant seeks not only stay of execution, but also an order of injunction. In our view, an order of injunction may, in appropriate cases, be granted even in cases where what is being appealed against is a negative order (see *Kimanthi v Kiiva & 2 others (Civil Application E321 of 2021)* [2021] KECA 283 (KLR) (3 December 2021) (Ruling)).

25. In this case, it is not in doubt that the 1<sup>st</sup> respondent is under receivership by the 7<sup>th</sup> respondent. The future of the 1<sup>st</sup> respondent as a going concern depends on its viability as a business entity. In the event that the receiver manager decides to dispose of the 1<sup>st</sup> applicant's assets in order to satisfy its indebtedness to the 7<sup>th</sup> respondent, it is clear that the suit property will suffer the same fate. While it is true that the 7<sup>th</sup> respondent may well pay damages, the applicant has no direct claim against the 7<sup>th</sup> respondent and, in order for it to make a claim against the 7<sup>th</sup> respondent in the event that its intended appeal succeeds, it would probably have to commence fresh proceedings against the 7<sup>th</sup> respondent. Balancing the interests of the parties in this application and, as the 7<sup>th</sup> respondent has not indicated that it has immediate plans of disposing of the suit property, we are of the view that this is a proper case in which the suit property ought to be preserved during the pendency of the intended appeal.
26. In the circumstances, the order that commends itself to us, and which we hereby grant, is that, pending hearing and determination of the appeal by the applicant against the Judgment and Order made on October 19, 2022 in ELC No. 22 of 2016 - Solian Investment Limited v KSC International Limited in Receivership, Chief Land Registrar, Registrar of Lands Kilifi, Registrar of Titles, District Surveyor Kilifi & the Attorney General - the respondents and their agents be and are hereby restrained from transferring, charging, selling or dealing in any manner whatsoever with the properties known as L.R No. Mtondia/Roka/11 and L.R No. 15351 CR 22091 North of Kilifi Creek. The costs of this application will be in the intended appeal.
27. 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 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 the true copy of the original

Signed

**DEPUTY REGISTRAR**

