



**Mohamed & another v Omar & 5 others (Civil Application
E011 of 2024) [2024] KECA 1565 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1565 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E011 OF 2024
AK MURGOR, JW LESSIT & GV ODUNGA, JJA
NOVEMBER 8, 2024**

BETWEEN

MOHAMED ABDI MOHAMED 1ST APPLICANT

ORNELLA BONTEMPILUIGI 2ND APPLICANT

AND

SHARIFF MOHAMED OMAR 1ST RESPONDENT

BOUGANVILLAE COTTAGES LIMITED 2ND RESPONDENT

RAKESH RAJPAL 3RD RESPONDENT

SAHALE ABDALLA SALIM 4TH RESPONDENT

REGISTRAR OF LANDS TITLES MOMBASA 5TH RESPONDENT

KHADIJA SHARIFF OMAR 6TH RESPONDENT

(Being an application for stay of execution of the Ruling of the Environment and Land Court (Njoroge, J.) dated 23rd April 2024 in E.L.C Case No. 130 of 2015.)

RULING

1. Before this Court is an application dated 25th April 2024 brought by the applicants pursuant to inter alia, rule 5 (2)(b) of this Court's Rules. The applicants seek an order of stay of execution of the ruling of Njoroge, J. delivered on 23rd April 2024 in Environment and Land Court (ELC) Case No. 130 of 2015 pending the hearing and determination of the intended appeal.
2. A brief background of the matter is that the 1st and 2nd respondents vide a plaint dated 31st July 2015 filed suit against the 2nd applicant (legal representative of the Estate of Bontempti Luigi - deceased, who was a shareholder of the 1st respondent's company), 3rd, 4th and 5th respondents for illegal transfer



- of portions of land no. 7861, 3044 and 8980 Malindi (herein referred as “the suit properties”). Vide judgment delivered on 1st March 2022, Odeny, J. found the suit properties to have been illegally transferred to the 2nd applicant, 3rd, 4th and 5th respondents and ordered for revocation, annulment and/or cancellation of the titles and rectification to reflect the 1st and 2nd respondents as the proprietors. She also issued a restraining order against the 2nd applicant, 3rd, 4th and 5th respondents from transferring, charging, selling, leasing or in any way dealing with the suit properties.
3. The 1st and 2nd respondents filed an application dated 15th August 2023 citing the 1st applicant for contempt of court.
 4. The 1st applicant, who claimed to have bought the property from the 2nd applicant vide a sale agreement dated 22nd October 2019 and had taken actual possession, hence had an overriding interest over the subject matter, filed an application dated 15th August 2023 seeking orders to stay the execution of the said judgment, the decree issued on 9th May 2022 and the eviction order issued on 27th July 2023. Also sought was that the said judgment and orders be set aside *ex-debito justitiae*, and for the hearing of the matter to commence *de novo*; that he be joined in the proceedings and be granted leave to file his response to the Plaint. His application was premised on grounds, *inter alia*, that he was never a party to the proceedings, yet an order of eviction had been issued against him; that he was also cited for contempt when he was never served; that hence the judgment and all consequential orders were irregular and a violation of his right to a fair hearing as enshrined under Article 50(1) of *the Constitution* of Kenya.
 5. The 2nd applicant also filed an application dated 5th September 2023 and sought orders that the said judgment, together with the consequential orders, be set aside pending the hearing and determination of the application; that there be restraining orders against the 1st and 2nd respondents; that the matter be commenced *de novo*; that she be granted leave to file her defence out of time, and that the 1st and 5th respondents be joined in the proceedings.
 6. All these applications were canvassed together by way of written submissions. By a ruling delivered on 23rd April 2024, Njoroge, J. ordered, *inter alia*, the dismissal of the application by the 2nd applicant, allowed the application by the 1st applicant to the extent that he be joined in the proceedings so as to facilitate execution of the orders of the court against him in the matter, and that the Officer Commanding Police Division (OCPD) Malindi assist with the eviction of the 1st applicant, his agents, servants and/or nominees residing on Plot No. 7861 Malindi.
 7. Aggrieved and dissatisfied with the entire ruling of Njoroge, J., the applicants lodged an appeal to this Court as evinced by the notice of appeal dated 24th April 2024. They also filed the instant application seeking orders as set herein above. The application is premised on the grounds set out on the face of the motion thereof and advanced in the supporting affidavit of Ornella Bontempiluigi, the 2nd applicant, sworn on 25th April 2024 on her behalf and that of the 1st applicant.
 8. The 1st and 2nd respondents filed a combined response through the replying affidavit of Sharif Mohamed Ahmed Omar, the 1st respondent and director of the 2nd respondent company sworn on 27th June 2024.
 9. At the virtual hearing of this matter on 2nd July 2024 Counsel Mr. Makworo appeared for the applicants whereas Counsel Mr. Matheka appeared for the 1st and 2nd respondents. We note that although served with a hearing notice, the 3rd, 4th, 5th and 6th respondents were not in attendance.
 10. Mr. Makworo relied on the applicants’ written submissions dated 28th June 2024. On arguability of the intended appeal, the applicants submit that they have duly filed a substantive appeal to this Court



to wit Malindi Civil Appeal No. E017 of 2024 which appeal is pending directions. Counsel urged that the appeal raises weighty issues as evidenced by the draft memorandum of appeal annexed to the affidavit in support of this application. In the draft memorandum of appeal, the applicants fault the learned judge for, inter alia, issuing orders of eviction in favor of the 1st and 2nd respondents who have no proprietary interest in the suit property; failing to set aside the judgment dated 1st March 2022 on the application premised on non-service on the 2nd applicant thus denying the applicants the right to be heard before being condemned, contrary to Article 50(1) of *the Constitution* of Kenya; and that the 1st applicant was in possession and actual occupation of land portion No. 7861 Malindi and had therefore an overriding interest that is protected under the law; that he was not a party in the suit yet adverse orders had been issued against him. It is contended that the Judge failed to consider the fact that the suit property being portion 7861 Malindi was not purchased from the funds belonging to the 2nd respondent but from a decree of the court in Malindi Civil Suit No. 72 of 2006, hence the applicants had triable issues in their defence.

11. On nugatory aspect, the applicants relying on this Court's decision in *Halai & Another vs. Thornton & Turpin (1963) Ltd* [1990] eKLR submit that if execution is allowed to proceed they will suffer irreparable loss and damages as they stand to lose their entire investment on the suit property without being accorded an opportunity to be heard under the tenets of substantive justice and a right to a fair hearing as enshrined under Article 50 of *the Constitution*. In addition, it is submitted that if the stay of execution is not granted then their appeal shall be rendered nugatory and shall be a mere academic exercise which shall serve no purpose to ensure justice prevails. He urged that it is in the interest of justice that the suit property being a portion of No. 7861 Malindi be preserved pending hearing and determination of the intended appeal.
12. Mr. Matheka for the 1st and 2nd respondents highlighted the written submissions dated 27th June, 2024. He submitted that no arguable points had been presented apart from the allegation there was a substantive appeal filed. It was argued that the applicants did not have an arguable appeal since they lacked capacity or locus. According to Mr. Matheka, the 1st applicant had not purchased the property as he had not fully paid the purchase price, while the 2nd applicant had never been registered as the owner of the suit property. It was submitted that the suit property is now owned by a 3rd party, the 6th respondent, who is not a party to the suit. In addition, it was submitted that the draft grounds of appeal did not disclose what defence, if any, would have been advanced contrary to the defence filed by deceased prior to his death.
13. On nugatory aspect, counsel submitted that the applicants will not suffer prejudice that cannot be adequately compensated by an award of damages.
14. Mr. Matheka notified the Court that there is a pending application for stay at the superior court and the same was coming for directions on 30th September 2024 hence a temporal order for stay was in place. The counsel thus urged the Court to dismiss the application.
15. In response to the Court's question as to what has brought the applicants to this court with such urgency, Mr. Makwaro stated that the 1st applicant is in actual occupation of the suit property since 2019 and was living with his family. Further, that the applicants have raised weighty issues in their substantive appeal hence if eviction by the 1st and 2nd respondents is allowed to proceed, then the appeal by the applicants would be rendered nugatory.
16. We have considered the application, the replying affidavit and submissions, as well as the applicable law. It is trite law that in an application of this nature an applicant must satisfy this Court that the appeal or the intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful,



shall be rendered nugatory. See Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR. Even one arguable ground of appeal will suffice. See

Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004.

17. We have considered the facts of this case and looking at the issues which the applicants intend to raise in their intended appeal. We are satisfied that the intended appeal is arguable. We note that the applicants were unaware of the suit; that the 1st applicant was in possession of a portion of the suit property. Looking at the draft memorandum of appeal, the applicants challenge the decision of the court to issue an eviction order in favour of the 1st and 2nd respondents who had no proprietary interest in the suit property. We need not say much on arguability at this stage, lest we embarrass the bench that shall eventually hear the appeal. We find that the appeal is arguable, it is not frivolous. See. Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd & 2 Others [2009] eKLR. We are satisfied that the applicants appeal is deserving of an audience by this Court.
18. On the nugatory aspect, we re-state what has already been said in Stanley Kangethe Kinyanjui case (Supra) 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. In doing so, we must also consider the conflicting claims for all parties and each case has to be determined on its merit. See. NIC Bank Limited & 2 Others vs. Mombasa Water Products Limited [2021] eKLR.
19. The applicants argue that they are apprehensive that if orders of stay are not granted, the 1st and 2nd respondent will proceed with execution which would not only cause them irreparable loss and damages as they stand to lose their entire investment, but would also entail evicting the 1st applicant from the suit property which Mr. Makwaro submitted his client is in actual possession and living with his family since 2019. We also note that in the impugned ruling, the learned judge ordered the Office Commanding Police Division (OCPD) Malindi to assist with the eviction of the 1st applicant, his agents, servants and/or nominees residing on plot number 7861 Malindi. It is our view that if execution were to proceed against the applicants, it might result not only in their eviction but demolition of any structures resting on the suit property. This would certainly irredeemably alter the structure and character of the suit property, and it is our view that damages may not be sufficient compensation in the circumstances. The property could also be disposed of, rendering it beyond the reach of the applicants.
20. On the other hand, nothing has been presented before us to show that if the application is granted, what prejudice, if any, the respondents stand to suffer. With the foregoing, we are satisfied that the applicants have demonstrated the second limb that their appeal shall be rendered nugatory if the orders of stay are not granted.
21. In the upshot, we find that the applicants have satisfied this Court on the twin principles for grant of stay under rule 5 (2)(b) of this Court's Rules. Accordingly, the Notice of Motion dated 25th April 2024 is merited and is hereby allowed. The costs of this application abide the outcome of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF NOVEMBER, 2024.

A. K. MURGOR

..... **JUDGE OF APPEAL**

J. LESIIT

..... **JUDGE OF APPEAL**



G. V. ODUNGA

..... **JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

