



**Aly (As trustee of the Wakf properties of Ali Bin Mohamed alias Muses Mohamed) & 2 others v Islamic Foundation (Civil Appeal (Application) E082 of 2022) [2023] KECA 73 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 73 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL (APPLICATION) E082 OF 2022  
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA  
FEBRUARY 3, 2023**

**BETWEEN**

**MOHAMED NAAMAN ALY (AS TRUSTEE OF THE WAKF PROPERTIES OF ALI BIN MOHAMED ALIAS MUSES MOHAMED) ..... 1<sup>ST</sup> APPLICANT  
ABDALLA MOHAMED ALY MUSES ..... 2<sup>ND</sup> APPLICANT  
ALY KHAN MUSES ..... 3<sup>RD</sup> APPLICANT**

**AND**

**ISLAMIC FOUNDATION ..... RESPONDENT**

*(Being an application for stay of execution pending hearing and determination of an intended appeal from the judgement and decree of the Environment and Land Court of Kenya at Mombasa (Hon Justice L.L. Naikuni delivered on 18th October 2022) In Mombasa ELC No 219 of 2016)*

**RULING**

1. Before us is an application brought by way of notice of motion dated November 9, 2022 expressed to be brought pursuant to rule 5(2)(b) of the *Court of Appeal Rules*. In the said motion, the applicants/appellants seek an order staying the execution of the judgement and decree of Honourable Justice L L Naikuni delivered on October 18, 2022 in Mombasa ELC No 219 of 2016 pending the hearing and determination of this appeal.
2. The applicants filed a suit before the trial court in their capacity as the trustees of the wakf properties of Ali Bin Ali Mohamed alias Muses Mohamed, a muslim charitable trust consecrated over Title CR No 57292/5 numbered as Plot No 9 section III mainland north, Kikambala, Kilifi county. The said property consists of one hundred and sixty two (162) acres of land.



3. The cause of action, according to the applicants arose from an offer dated March 23, 2009 by which the applicants granted 50 acres of the said wakf property to the respondent, an islamic foundation and also a trust, for the purposes of setting up an islamic university. Consequently, the respondent took up possession of 2 acres of the said property and erected an islamic institution of learning.
4. According to the applicants, the trustees of the wakf are not empowered to give any or transfer of the wakf properties since the wakf deed restricts the disposition of wakf land to grants of leases not exceeding three years. Therefore, the trustees of the wakf have no powers to transfer the wakf properties, absolutely. It was, therefore, sought that the court declares that the occupation of the wakf property by the respondent was contrary to the objects of the wakf and for the eviction therefrom of the respondent.
5. In response the respondent denied the applicants' claim and counterclaimed for a declaration that the 1<sup>st</sup> applicant had the legitimate mandate to grant the said 50 acres pursuant to the trust deed and sought a specific performance of the subdivision of the wakf property in order to hive off or excise the said 50 acres from the large wakf property and transfer the same to the respondent, absolutely.
6. Upon hearing the matter, the learned judge in a judgement delivered on October 18, 2022, dismissed the applicants' suit and entered judgement in favour of the respondent as prayed in the counterclaim. It was that decision that provoked both the instant appeal and the instant application.
7. According to the applicants the appeal is arguable and raises weighty and substantial issues of law and of general public importance as regards the powers of the trustees and whether they acted in excess of their powers under the trust documents; whether legitimate expectation can go contrary to the law; whether the court properly exercised its powers; whether the purpose for which the trust property was applied was within the objects of the trust deed; and whether the learned judge ignored, misapprehended and failed to appreciate the unique status of a muslim charitable trust or wakf in Kenya.
8. It was contended that in the said decision, the court directed the land registrar, Mombasa to subdivide the said property within 60 days from the date of the decision. It was averred that the effect of the said decision is that 50 acres of the wakf property is at a risk of being hived off, subdivided and transferred to the respondent, absolutely, in which event the respondent would be at liberty to sell, transfer, lease, subdivide and deal therewith unfettered by the time the appeal is heard and disposed of. That course, it was contended, would alter the character of the suit property forever. The applicants, however, had no issue with the respondent's continued possession of the 2 acres already developed by the respondent as a learning institution.
9. When the matter was called out for virtual hearing before us on December 6, 2022, Mr Benjamin Njoroge, learned counsel for the applicant reiterated the foregoing and urged us to restrain any further developments on the suit property.
10. In opposing the application, the respondent's position was that the application had no merit, was an abuse of the courts process and thus ought to be dismissed with costs. According to the respondent, the respondent is not only an islamic institution but also a wakf created for purposes of advancing education within the Republic of Kenya and assisting the less fortunate by supporting them in their education and other social areas. According to the respondent, since the objects of the wakf were also for purposes of promoting education and worship, respondents objects were similar to the objects of the wakf by muses muhamed hence there was nothing wrong with the applicants' grant of 50 acres of the land to the respondents for purposes of setting up an islamic university.
11. Ms Amina Mohamed, learned counsel for the respondent who addressed virtually at the hearing submitted before us that since the hiving off of the land is capable of being reversed upon the issuance



of a court order, it cannot be said that the appeal will be rendered nugatory if the stay is not granted. On the other hand, it was submitted that the respondents stand to be greatly prejudiced and disadvantaged since they are already in possession of property and require the whole grant having constructed on only 2 acres.

12. We have considered the application, the submissions both written and oral and the law.
13. The principles that guide consideration of an application of this nature are now well settled. For an applicant to succeed he/she must have expressed an intention to appeal against the decision in question by filing a notice of appeal and then, demonstrate, at the hearing of the application, that the appeal, or intended appeal, as the case may be, is arguable, or, as is often said, not frivolous. The applicant must, in addition, show that the appeal would be rendered nugatory, absent stay.
14. In this case the notice of appeal dated October 25, 2022 was lodged on October 27, 2022. In this appeal, the applicants will set out to convince us, inter alia, that the learned trial judge ignored, misapprehended and failed to appreciate the unique status of a muslim charitable trust or wakf in Kenya and therefore arrived at a wrong decision when he decreed the wakf could be hived off contrary to the provisions of the trust deed. Although the respondent has urged us to find that there are no arguable grounds, we respectfully are of the view that this is not an idle ground. we, in fact, are of the considered view and find that the appeal is arguable since it questions the actions of the trustees and whether the hiving off was within their powers. This court in *Stanley Kang'ethe v Tony Keter & 5 others* [2013] eKLR elaborated on this when it held that it is sufficient if a single *bonafide* arguable ground of appeal is raised. See *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, civil application No Nai 345 of 2004. Further, that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. See *Joseph Gitahi Gachau & another v Pioneer Holdings (A) Ltd & 2 others*, Civil Application No 124 of 2008.
15. On the nugatory aspect, which an applicant must also demonstrate, it has been held by this court that the term 'nugatory' has to be given its full meaning since it does only mean worthless, futile or invalid but also means trifling. Further, whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed, if allowed to happen, will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved. See *Stanley Kangethe Kinyanjui v Tony Ketter and 5 others* (supra).
15. In this case, the effect of the decision made by the learned trial judge is that the suit property risks being hived off, subdivided and 50 acres therefrom transferred to the respondents. The respondents have disclosed that they are in need of the said property in order to carry out the developments of the learning institution which they run. Apart from the possibility that the property or at least part of it may well change hands, the intended construction is likely to alter the character of the property with the possibility that in the event that the appeal succeeds it might not be possible to restore it to its former state, at least not without incurring substantial expenses. In *Raol Investment Lt v Lake Credit Finance Ltd* Civil Application No Nai 303 of 1997, this court opined that in cases where the dispute revolves around land should the property pass to a third party, the appeal or intended appeal would be rendered nugatory.
16. It is therefore our view and we find that the applicants have met the twin conditions for the grant of stay pending appeal. in the premises, the order that commends itself to us and which we hereby grant is that pending the hearing and determination of this appeal there be a stay of execution of the judgement and decree of Honourable Mr Justice L L Naikuni delivered on October 18, 2022 in Mombasa ELC No 219 of 2016 as regards the 48 acres which are not in possession of the respondent. For avoidance of doubt, we direct that the status quo pertaining on the ground as regards the title CR No 57292/5



numbered as plot No 9 section III mainland north, Kikambala, Kilifi county as of the date of this ruling be maintained pending the hearing and determination of this appeal.

15. The costs of this application will be in the appeal.

16. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2023.**

**S. GATEMBU KAIRU (FCI Arb.)**

.....

**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....

**JUDGE OF APPEAL**

**G. V. ODUNGA**

.....

**JUDGE OF APPEAL**

*I certify this as a true Copy of the original*

*Signed*

**DEPUTY REGISTRAR**

