



REPUBLIC OF KENYA



**Mbarak v Freedom Limited (Civil Application E008 of 2022)
[2023] KECA 71 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 71 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E008 OF 2022
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
FEBRUARY 3, 2023**

BETWEEN

OMAR AWADH MBARAK APPLICANT

AND

FREEDOM LIMITED RESPONDENT

(eing an application brought under Rule 5(2)(b) of the Court of Appeal Rules 2010 for stay of execution of the decree pending the lodging, hearing and determination of an intended appeal from the judgment of the Environment & Land Court at Mombasa (Matheka, J.) delivered on 19 th January 2022 in ELC Case No. 358 of 2016)

RULING

1. Pending the hearing and determination of his intended appeal, the applicant Omar Awadh Mbarak, by his application dated February 16, 2022 presented under Rule 5(2)(b) of the Court of Appeal Rules seeks an order for stay of execution of a judgment delivered on January 19, 2022 by which the Environment and Land Court (ELC) (N Matheka, J) decreed in favour of Freedom Limited, the respondent, that the applicant has no right or interest over a property known as Plot No 1948 (Original No 412/20) Section V M N registered as CR No 32564 and restrained him, by permanent injunction, from interfering or dealing with that property.
2. In the same judgment, the ELC dismissed the applicant’s counterclaim in which he had sought, among other reliefs: a mandatory injunction against the respondent to compel it to give vacant possession of the property and demolish structures constructed thereon; a declaration that the transfer of the said property dated November 12, 2010 in favour of the respondent is null and void; and an order directing the Land Registrar Mombasa to cancel the respondent’s title.
3. During the virtual hearing of the application before us on December 6, 2022, learned counsel Mr Gakuo appeared for the applicant. He referred to the grounds in support of the application, the



supporting affidavit of the applicant, the applicant's written submissions dated March 30, 2022, and his list of authorities in urging that the intended appeal is arguable and that if the orders sought are not granted, the intended appeal will be rendered nugatory.

4. On arguability, counsel referred to the grounds of appeal set out in the memorandum of appeal attached to the application. On the nugatory aspect, counsel submitted that the respondent is at liberty to dispose of the property, and should that happen, the appeal will be rendered nugatory. The case of *East African Portland Cement Company Limited v Superior Homes (Kenya) Limited* [2014] eKLR, among others, was cited.
5. In opposing the application, learned counsel Mr Borana, for the respondent referred to a replying affidavit sworn by Harji Govind Ruda, a director of the respondent as well as his written submissions dated March 10, 2022 and his list of authorities. He also referred to further submissions dated November 28, 2022 and further digest of cases which Mr Gakuo opposed and submitted that the same should be expunged on basis that the respondent is thereby un-procedurally seeking to introduce evidence which should have been done through an affidavit.
6. Mr Borana submitted that the intended appeal is frivolous, that the applicant has no locus standi to claim the property as the High Court in Mombasa has, by its judgment delivered on October 21, 2022, has resolved that the property is not part of the estate of Mbarak Awadh Salim, deceased, the applicant's grandfather under whom the applicant claims; that the intended appeal is not arguable; that the contention by the applicant that the property had not been subdivided is frivolous in light of the Gazette Notice which shows that a portion of the property was indeed acquired by the Government and sub- divided; that the question of the appeal being rendered nugatory does not arise, where, as here, the intended appeal is frivolous.
7. We have considered the application, the affidavits, and the submissions. For a start, we think Mr Gakuo was justified in urging the Court to disregard the respondent's further submissions as the applicant did not have an opportunity to respond. However, as for the respondent's further digest of cases, we note the same consists only of a judgment of the High Court in Succession Appeal No E14 of 2020 between the same parties, and relates to the estate of Mbarak Awadh Salim, deceased, under whom the applicant claims, and is therefore relevant. That said, the respondent's claim before the ELC which was upheld in the impugned judgment was that it is the proprietor of the property, and that the applicant was wrongfully and unlawfully purporting to assert a right over the same.
8. The applicant's claim, on the other hand, was that his grandfather, Mbarak Awadh Salim, deceased purchased a property registered as CR 6302, Plot No 287 of Section V measuring approximately 983 acres of land "which has never been subdivided as it still contains by measurement 983 acres or thereabouts" and that "his late grandfather is the lawful proprietor of the suit property...which has never been subdivided". As we understand it, it was the applicant's case, that absent subdivision of his grandfather's property, the respondent could not lay claim to property known as Plot No 1948 (Original No. 412/20) Section V M N registered as CR No 32564.
9. One of the applicant's grievances with the impugned judgment as stated in the memorandum of appeal is that the learned Judge of the ELC erred in her conclusion regarding the question of subdivision. Bearing in mind that an arguable appeal is not one that must necessarily succeed (See *Joseph Gitabi Gachau & Another v Pioneer Holdings (A) Ltd & 2 others*, Civil Application No 124 of 2008) we think it is indeed arguable whether the learned Judge was right in holding that the applicant had failed to demonstrate that the property had not been sub-divided and in dismissing his counterclaim. The first requirement is therefore fulfilled.



10. On the nugatory aspect, it is not clear, as pointed out by counsel for the respondent, what precisely is sought to be stayed. As already noted, the respondent’s suit was allowed. A declaration was granted that the property belongs to the respondent and that the applicant has no right over it. An order of injunction was issued to restrain him from interfering or dealing with the property. To order a “stay” of the restraining order at this stage would be tantamount to prematurely overturning the judgment of the ELC prior to the hearing of the appeal. On the other hand, the ELC dismissed the applicant’s counterclaim. That order for dismissal is not capable of being stayed. In *Joyce Mutethya Kimanathi v Timothy Kimanzi Kiiva and others*, Nai Civil Application No E321 of 2021, the Court expressed that:

“As correctly contended by the 2nd respondent, what the High Court issued as the final order is a negative order, dismissing the applicants case. It is now trite that a negative order is incapable of being stayed. See *Nairobi Metropolitan PSV Saccos Union Limited and Twenty Five others v County of Nairobi Government and three others* [2014] eKLR for the proposition that there is no jurisdiction to grant a relief under Rule 5(2) (b) of this Courts Rules where the High Court’s order either resulted in a dismissal or a striking out order; or alternatively where the court did not order either party to do or refrain from doing something capable of being restrained.”

11. Moreover, beyond the statement that the respondent “is at liberty to dispose the suit property” it has not been demonstrated that there is afoot steps taken in that direction or that the property is under threat.

12. In effect, the application fails and is dismissed with costs to the respondent.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF FEBRUARY, 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

