



REPUBLIC OF KENYA



Mudachi & 11 others v Pwani Jezozhum Company Limited; Njiru & 5 others (Interested Parties) (Civil Application E049 of 2022) [2023] KECA 105 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 105 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E049 OF 2022
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
FEBRUARY 3, 2023**

BETWEEN

**KABU MUMBA MUDACHI 1ST APPLICANT
SHEHI MURISA KUMBI 2ND APPLICANT
LUKA TIMONA OLULEMBE 3RD APPLICANT
GABRIEL ODANGA WANDERA 4TH APPLICANT
DOBINSON DZOMBO TAKA 5TH APPLICANT
FIDELIS MUTUA NDEGWA 6TH APPLICANT
MWANZALA NYAE KIDUNGA 7TH APPLICANT
SAMUEL TUVA KAVINGO 8TH APPLICANT
MATANO KOMBE CHIFULO 9TH APPLICANT
JOYCE L LEWA 10TH APPLICANT
PHILIP THOYA 11TH APPLICANT
COSMAS K JAMBO 12TH APPLICANT**

AND

PWANI JEZOZHUM COMPANY LIMITED RESPONDENT

AND

**OBED ELIPHAS NJIRU INTERESTED PARTY
ABDALLA ASHUR ABEID INTERESTED PARTY
RAMMADHAN AHMED HASSAN INTERESTED PARTY
AHMED RAMADHAN AHMED INTERESTED PARTY**



GEORGE MUITO KINGORI INTERESTED PARTY

KALUME SAFARI INTERESTED PARTY

(Being an application for stay pending appeal from the judgment and decree of the Mombasa Environmental and Land Court delivered by Hon Justice Sila Munyao on November 10, 2021 in ELC Case No 383 of 2009 (OS))

RULING

1. The applicants filed their Notice of Motion application dated July 18, 2022 under certificate of urgency. The application is brought pursuant to rule 5 (2) (b); 41, 42 (2), 43, and 47 of the Court of Appeal Rules 2010 (now rules 5 (2) (b); 43, 44 (2), 45, and 49 of the 2022 Rules) (hereinafter the rules). They seek order 2, that pending hearing and determination of the appeal, there be stay of execution of the judgment and order made in the ELC Case no 383 of 2009 delivered on the November 10, 2021.
2. The background to the application is that the ELC dismissed the applicants' suit against the respondent, in which they claimed title to the land being no CR no 338, subdivision no 830/II/MN (original no 155/II/MN) said to measure 350 acres or thereabouts by way of adverse possession.
3. The ELC in its judgment noted that the land title claimed by the applicants no longer existed. That going by the evidence of Samuel Kariuki Mwangi, a principal land registrar, it was revealed that the title to the suit land was converted to the Registered Land Act regime through Gazette Notice no 173 of 5 April 1990; that the register was closed and the original title surrendered for cancellation. That a new register under the Registered Land Act was opened and the suit land registered as Kisauni/Kisauni/Block1; that upon subdivision, titles Kisauni/Kisauni/Block 1-159 were issued and that some of the titles were issued to third parties.
4. The application is supported by an affidavit sworn by Kabu Mumba Mudachi, one of the appellants. It has annexed to it the draft memorandum of appeal that raises nine grounds of appeal based on which the proposed prayers in the appeal are that the appeal be allowed; that the judgment and decree of the honourable judge given on November 10, 2021 be set aside or reversed; that the respondent's case be dismissed with costs; and, that costs be provided for.
5. The application is opposed vide the sworn affidavit of the 2nd interested party on his behalf and on behalf of the 3rd to 5th interested parties.
6. The application was heard on the virtual platform on the September 7, 2022. learned counsel retired Justice Andrew Hayanga was present for the applicants, while learned counsel Mr Mwaniki Gitau was present for the respondent, and Mr Abdallah Ashur Abed, the 2nd interested party appeared on his behalf and for the 3rd, 4th and 5th interested party. There was no appearance for the 1st interested party despite service with the hearing notice.
7. Mr Hayanga in his oral submissions relied on his filed submissions dated August 30, 2022 as well as the supporting affidavit. Counsel cited the case of *RWW vs EKW* (2019) eKLR for the proposition that the purpose of a stay application is to preserve the status quo pending the appeal. He urged that there is an arguable appeal that touches on the effect and meaning of obtaining a certificate of search signed by the registrar of lands upon filing for adverse possession. Counsel urged that if the applicant does not succeed in obtaining the order of stay the respondent will have title of ownership in his hands and may proceed to give land to third parties and dispose of the land without any restraint; and that in



which case the appeal if successful would be rendered nugatory. That the issues of law envisaged in the appeal are legal and serious and includes the issue of the meaning of land in the *Constitution*? Whether change in the legal regime under which land is registered affects the interests of persons in occupation or in possession or with a claim over such land. Also what has one to show in the case of adverse possession under *Limitation of Actions Act*. He urged that in an application for stay of execution, the Court of Appeal is not fettered; that the overriding objective, in the administration of justice was to do substantive justice, and urged the court to give the applicants a chance to argue their appeal. Counsel relied on the case of Consolidated Marine vs Nampitt And Civil Application no NAI 93 OF 1989 where the Court of Appeal discussed the purpose of an application for stay and stated as follows:

“The purpose of application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of appellant who is exercising his undoubted right of appeal are safeguarded and appeal if successful is not rendered nugatory”

8. Mr Mwaniki Gitau for the respondent relied on his written submissions and the replying affidavit sworn by a director of the respondent both dated September 2, 2022. Counsel urged that the subject matter cannot be preserved, the original title having been surrendered, sub-divided into several portions, and transferred to numerus persons who were not enjoined in the ELC suit and the appeal.
9. The interested parties also oppose the application. Abdallah Ashur Abed, the 2nd interested party filed the submissions in opposition to the application on behalf of the 2nd to 5th interested parties. Mr Ashur in his oral submissions refuted that there was an arguable appeal and urged that the intended appeal was intended to stifle the respondent and interested parties’ enjoyment of the fruits of their judgement.

It was refuted that execution had commenced; that there is nothing to execute as the suit property does not exist for the reason that the same was subdivided into several plots. He emphasized that litigation must come to an end as the suit has been in the court corridors for 12 years since November 5, 2009.
10. We have considered the application, the affidavits, and the submissions. The applicants are required to demonstrate that their intended appeal is arguable and that the appeal will be rendered nugatory if the orders they seek are declined, and the intended appeal ultimately succeeds. See *Stanley Kangethe Kinyanjui vs Tony Ketter and 5 others* [2013] eKLR.
11. In the memorandum of appeal attached to the supporting affidavit, and in the written submissions the, applicants assert, among other things, that the learned judge, in dismissing their suit failed to give due regard or consider the effect of change of law regimes where the land claimed was registered under the Land Titles Act which has been repealed, and its impact on persons claiming through adverse possession. Bearing in mind that an arguable appeal is not one that will necessarily succeed, we are satisfied that the intended appeal is not frivolous. It is arguable.
12. As to whether the appeal will be rendered nugatory if the orders sought are not granted, it has been urged that the order sought to be stayed is a negative order that is incapable of being stayed. It has also been urged that the land the subject matter of the suit was sub-divided and issued out to numerous persons. We have considered these issues, and the fact that if compensation would be an adequate remedy if the order sought were not granted, and the appeal were to succeed.
13. That was however not all. The 1st applicant, on behalf of all the applicants averred that the applicants represent about 500 families who live on the suit land, and have been in occupation for over thirty years; have developed the land, built homes, schools, hospitals. It is contented that if the order sought is not granted, they will have to vacate the land, which will cause them enormous damage and loss which



may render their intended appeal nugatory was the order sought is not granted, and was the appeal to succeed.

14. We are satisfied, in view of the number of persons who stand to be affected, and the great disruption they stand to face to their daily lives, that an order for the preservation of the situation as it exists on the ground is not only important but necessary, in order to preserve the subject matter of the appeal. This will give the applicants a chance to pursue their appeal. We are satisfied that the respondents do not stand to suffer any prejudice if the order of status quo is made, or at least none has been alleged.
15. The order that commends itself to us is: that, pending the hearing and determination of the appeal, the status quo as it exists on the ground be maintained. The costs of the application shall abide the outcome of the appeal,

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

S GATEMBU KAIRU, FCI Arb

.....

JUDGE OF APPEAL

P NYAMWEYA

.....

JUDGE OF APPEAL

J LESIIT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

