



**Mbarak (In the matter of the Estate of Mbarak Awadh Salim (Deceased) v Freedom Limited
(Civil Application E004 of 2023) [2023] KECA 350 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KECA 350 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E004 OF 2023
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MARCH 31, 2023**

BETWEEN

**OMAR AWADH MBARAK (IN THE MATTER OF THE ESTATE OF MBARAK
AWADH SALIM (DECEASED)) APPLICANT**

AND

FREEDOM LIMITED RESPONDENT

(Being an application for injunction pending the hearing and determination of an intended appeal from the judgment of the High Court of Kenya Family Division at Mombasa (Onyiego, J.) delivered on 21st October 2022 in High Court Succession Appeal No. E14 of 2020)

RULING

1. In a judgment delivered on October 21, 2022, the High Court at Mombasa (Onyiego, J.) in Succession Appeal No. E14 of 2020 determined that the Chief Kadhi has no jurisdiction to entertain a dispute over land ownership. In addition, the High Court reviewed orders of the Chief Kadhi made on June 12, 2013 and issued on June 18, 2013 and removed a property known as Plot Number 287 Section V Mazera's (the property) from the list of assets for distribution from the estate Mbarak Awadh Salim, deceased, pending the hearing and determination of pending civil proceedings in ELC Case No. 358 of 2016.
2. Aggrieved, the applicant lodged a notice of appeal on the strength of which he has moved this Court under Rule 5(2)(b) of the Court of Appeal Rules for an order of injunction to restrain the respondent from carrying out any new and/or further subdivision, demarcating, selling, charging or leasing the property or carrying out further acts with the aim of further alienating the property and further disposition of the same to third parties pending the hearing and determination of the intended appeal.
3. We heard Miss. Mulongo, learned counsel for the applicant and Mr. Borona, learned counsel for the respondent on February 28, 2023 when they orally highlighted their respective written submissions



dated February 27, 2023 and February 15, 2023, which we have considered alongside the affidavit sworn by Omar Awadh Mbarak supporting the application and the replying affidavit in opposition sworn by Harji Govind Ruda a director of the respondent.

4. To succeed in his prayers in the application, the applicant is required to demonstrate that the intended appeal is arguable and that should the Court decline to stay the impugned judgment, and the appeal succeeds, it will be rendered nugatory. See for instance *Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union* (Kenya) [2015] eKLR.
5. In that regard, the applicant contends, and counsel urged that the learned Judge erred in reviewing the orders made by the Chief Kadhi without indicating what errors the Kadhi had made; and that the Judge therefore erred in directing the removal of the property from the list of assets for distribution. The respondent on the other hand has urged that the intended appeal is not arguable; that the property is not registered in the name of the deceased and does not comprise part to the estate of the deceased and cannot therefore be distributed to any of his dependants.
6. Bearing in mind that an arguable appeal is not one that must necessarily succeed when the appeal is ultimately determined but one that is deserving of full consideration by the Court (See *China Road & Bridge Corporation (K)Ltd vs. African Gas & Oil Co. Ltd & 3 others* [2016] eKLR), we are satisfied, having regard to the complaints set out in the draft memorandum of appeal that the intended appeal is not frivolous. It is arguable.
7. On the nugatory aspect, it was urged that unless the orders sought are granted and the appeal succeeds, the estate will never be able to recover the asset and that the estate will be exposed to a multiplicity of suits. For the respondent, on the other hand, it was deponed that the property no longer exists having been sub-divided and the injunctive prayers sought have no merit. It does not seem feasible to us that the situation will be reversible should further sub-division and alienation of the property go on, and the appeal eventually succeed. In the circumstances, the order that commends itself is an order that the status quo obtaining at the date of delivery of this ruling shall be maintained pending the hearing and determination of the intended appeal conditional upon the applicant filing and serving a competent record of appeal within 45 days from today, failing which the order for maintenance of status quo granted herein shall automatically lapse and be discharged without further ado.
8. The costs of the application shall be in the intended appeal.

DATED AND DELIVERED AT MOMBASA THIS 31ST DAY OF MARCH 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed



DEPUTY REGISTRAR

