



**Mwalimu & 6 others v Halal & another (Civil Application  
E091 of 2022) [2023] KECA 634 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KECA 634 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E091 OF 2022  
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA  
MAY 26, 2023**

**BETWEEN**

**ATHMAN MWALIMU ..... 1<sup>ST</sup> APPELLANT  
FADHILI MWALIMU ..... 2<sup>ND</sup> APPELLANT  
HAFUS MWALIMU ..... 3<sup>RD</sup> APPELLANT  
ABDULHAKIM MWALIMU ..... 4<sup>TH</sup> APPELLANT  
YUSUF MWALIMU ..... 5<sup>TH</sup> APPELLANT  
MARIAM MWALIMU ..... 6<sup>TH</sup> APPELLANT  
OMARI MWALIMU ..... 7<sup>TH</sup> APPELLANT**

**AND**

**HIRJI RAMJI HALAL ..... 1<sup>ST</sup> RESPONDENT  
NARAN RAMJI HALA ..... 2<sup>ND</sup> RESPONDENT**

*(Being a stay of execution of the judgment of the High Court at Mombasa (Hon. Nelly Matheka)  
delivered on the 22nd day of November, 2022 in Mombasa ELC Case No. 370 of 2010 (OS))*

**RULING**

1. On October 25, 2010, the appellants/applicants herein filed an originating summons before the Mombasa Environment and Land Court against the respondents seeking substantially that the court declares that they were entitled to Land Reference No. Mombasa Island Block XV/29 by way of adverse possession. The said originating summons was amended on February 12, 2022.

According to the applicants, they first entered the suit property as tenants of the then proprietor, Georgina Christian and paid rent between 1970 and 1980, when they stopped the payment of rent



- but continued occupying the said property as owners thereof. The said property was subsequently transferred to respondents.
2. Upon hearing the parties to the suit, the Learned Judge of the Environment and Land Court (Hon. N. A. Matheka, J) by her judgement delivered on November 22, 2022, found the said originating summons unmerited and dismissed it with costs to the respondents. Aggrieved by the said decision, the applicants, on November 29, 2020, gave a notice of intention to appeal vide the notice of appeal of the same date.
  3. By a notice of motion dated December 15, 2022, the applicants are seeking that this court stays the execution of the said decision of the Environment and Land Court and in particular the distress dated December 9, 2022, pending the hearing and determination of the appeal against the said judgement. It is further sought that this court directs that the status quo be maintained in respect of Land Title No. Mombasa Island Block XV/29 and 31.
  4. According to the affidavit in support of the said Motion sworn by Yusuf Mwalimu, the 5<sup>th</sup> applicant herein, the applicants have an arguable appeal, one of the grounds being that the Learned Judge ignored the evidence of the Land Registrar in arriving at her decision. According to the applicants unless the stay order sought is granted, they stand to suffer irreparable harm and damages
  5. In response to the application, the 2<sup>nd</sup> respondent in his affidavit sworn on December 22, 2022, averred that he was the absolute proprietor of the suit property following the death of the 1<sup>st</sup> respondent herein in 2021; that in light of the admission by the applicants that they entered the suit property via tenancy agreement, it was strange that they were seeking adverse possession; that the applicants' suit having been dismissed no positive order ensued therefrom which is capable of being executed; that what the applicants ought to have applied for was an injunction pending the hearing of the appeal; that as the applicants have not offered any security, they do not deserve any protective orders from this Court; and that being the successful litigant, the 2<sup>nd</sup> respondent ought to be allowed to enjoy the use of his property.
  6. The application was heard on the Court's virtual platform on February 6, 2023. Learned Counsel Mr Ambwere appeared for the applicants while learned counsel Mr Gikandi Ngibuini appeared for the 2<sup>nd</sup> respondent. Both Learned Counsel informed the court that they had filed their submissions which they relied upon.
  7. According to the submissions filed on behalf of the applicants, this Court ought to find that based on the contention that the title of the suit land is fraudulent and as the evidence of the Land Registrar was not considered by the Learned Judge, the Applicants have an arguable appeal. It was submitted by Mr Ambwere that one of the issues this court will be called upon to address is whether a claim adverse possession comes to an end upon transfer notwithstanding the fact that the transfer took place after the period of possession had run for over 12 years.
  8. As regards the second condition whether the success of the appeal will be rendered nugatory if the stay is not granted, it was submitted that in a claim for adverse possession, the divesting of possession defeats the entire claim if it has not crystallised through court action. Therefore, the constructive eviction by way of distress for rent, if allowed, will defeat the applicants' claim for adverse possession as they will no longer be in possession and the matter will be overtaken by events. It was further submitted that the Applicants have been on the land for 50 years during which period they have never paid any rent hence there is no basis upon which the rents being claimed by the 2<sup>nd</sup> respondents can be determined. According to the applicants, once they are evicted, the status of the suit property is likely to change.



9. In opposing the application, it was submitted on behalf of the 2<sup>nd</sup> respondent that in light of the fact that no positive order was issued by the trial court, an application for stay for execution does not lie as there is no order capable of being executed. According to the 2<sup>nd</sup> respondent, the applicants' conduct before the trial court disentitles them to favourable orders of stay. The applicants, it was contended, failed to demonstrate that unless the stay is granted they will suffer irreparable loss and that the appeal will be rendered nugatory should the applicants be called upon to pay rent which they have not paid for the last 29 years. In support of the submissions reliance was placed on Justus [\*Chai Mbaru & 12 others v County Government of Mombasa and National Land Commission and 19 others\*](#) [2021] eKLR and [\*Benson Karomo & another v Paul Onyango & another\*](#) Mbs Civil Application No. E013 of 2022.
10. We have considered the application, the submissions both written and oral and the law.
11. In an application for orders under rule 5(2)(b) of the rules of this court, for an applicant to succeed he/she must 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. See [\*Justus Chai Mbaru & 12 Others v County Government of Mombasa and National Land Commission and 19 Others\*](#) [2021] eKLR.
12. In this case, the Applicants have urged before us that in their appeal, they intend to argue that the Learned Trial Judge erred in finding that a transfer of land the subject of adverse possession terminates the claim for adverse possession. In our view, whether a transfer in respect of land whose title is alleged to have been lost by adverse possession disentitles the adverse possessor to his claim to the subject property is clearly an arguable point and is not frivolous. Secondly, it is arguable whether the Learned Trial Judge considered the evidence of the Land Registrar in arriving at her decision. As was held by this Court in [\*National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another\*](#) [2006] eKLR:
 

“It is to be remembered that in an application such as this the grounds are not to be argued; all an applicant is required to do is to point out to the Court the ground or grounds which he believes are arguable and leave it to the Court to decide on the issue of whether or not the matters raised are arguable.”
13. This Court in [\*Stanley Kang'ethe v Tony Keter & 5 others\*](#) [2013] eKLR emphasised that as regards the question whether the appeal is arguable, it is sufficient if a single bona fide 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. It is therefore important for the applicant to satisfy the Court that the ground or intended ground is bona fide without satisfying the Court that the said ground will necessarily succeed. As long as the point raised is bona fide and ought to be argued fully before the Court, the same meets the arguability or non-frivolity test. See [\*Joseph Gitabi Gachau & Another v. Pioneer Holdings \(A\) Ltd. & 2 others\*](#), Civil Application No. 124 of 2008.
14. That it is not necessary for the applicant to show that he has a multiplicity of the grounds in order to succeed was reiterated by this Court in [\*Somak Travels Ltd v Gladys Aganyo\*](#) [2016] eKLR where it was appreciated that:
 

“It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this Court.”
15. Accordingly, it is our finding that the Applicants have surmounted the first test.



16. Regarding the second test, it is true that the decision by the Learned Trial Judge had the effect of dismissing the Applicants' claim. Accordingly, that order being a negative order, it is not a candidate for an order for stay pending an appeal. There is a string of authorities to that effect. See *Joyce Mutethya Kimanthi v Timothy Kimanzi Kiiva and others*, Nai Civil Application No. E321 of 2021.
17. In this case, however, the applicant, in prayer 3 of the Motion seeks an order for status quo in respect of Title No. Mombasa Island Block XV/29 & 31. Whereas we have no jurisdiction to stay a negative order, this Court in exercise of its inherent and original jurisdiction has power to grant such orders as will preserve the substratum of the appeal by an order for maintenance of the status quo. In this case, there is no doubt that, whether rightfully or wrongfully, the Applicants have been in possession of the suit property for more than two decades. In our view, this Court ought to issue orders which would best serve the interest of justice in line with the overriding objective of the *Appellate Jurisdiction Act* in Sections 3A and 3B of the said Act. In the circumstances, we allow prayer 3 of the Motion dated December 15, 2022 in the following terms:
- i. The status quo pertaining on the ground as of the date of this ruling in respect of Title No. Mombasa Island Block XV/29&31 be maintained pending the hearing and determination of the intended appeal.
  - ii. The applicants shall file and serve their memorandum of appeal and record of appeal within 60 days from the date of this ruling and in default of compliance, order (i) granted hereinabove for maintenance of the status quo shall automatically lapse.
  - iii. The costs of this application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF MAY, 2023.**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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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**

