



**Otundo & 5 others v Creek Development & Development Limited (Civil Application E069 of 2022) [2023] KECA 500 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KECA 500 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E069 OF 2022  
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA  
MAY 12, 2023**

**BETWEEN**

**BERNARD ONKUNDI OTUNDO ..... 1<sup>ST</sup> APPLICANT  
BARNABAS KIPROP BWAMBOK ..... 2<sup>ND</sup> APPLICANT  
KEFA NYAMONGO OENGA ..... 3<sup>RD</sup> APPLICANT  
DANCAN OCHENGE OYARO ..... 4<sup>TH</sup> APPLICANT  
KENNETH ODUOR ESAU ..... 5<sup>TH</sup> APPLICANT  
JAMES KAMBO MUTHUSI ..... 6<sup>TH</sup> APPLICANT**

**AND**

**CREEK DEVELOPMENT & DEVELOPMENT LIMITED ..... RESPONDENT**

*(An application for an order of stay of execution pending the hearing and determination of the Intended appeal from the judgment and decree of the Environment and Land Court of Kenya at Mombasa delivered by N. Matheka, J. delivered on 27th September 2022 in Mombasa ELC No.14 of 2013)*

**RULING**

1. The Applicants and the Respondent entered into a sale agreement dated July 21, 2011 for the sale of the property known as Kilifi/Mtwapa/403, hereinafter the suit property, at the purchase price of Kshs 33,500,000/-. The Applicants contend that after they paid the entire purchase price, and after the suit property was registered in their names and those of their financiers on July 12, 2012, the Respondent declined to give them vacant possession of the suit property.
2. The Applicants filed a case before the Environment and Land Court seeking vacant possession of the suit property and mesne profits from the Respondent. The Respondent, in its defence and counter



- claim laid claim for further payment of Kshs 6,540,000/- being interest and balance of the purchase price and Kshs 10,000/- as security charges for taking care of the property.
3. In the judgment of the ELC delivered on September 27, 2022, N Matheka, J dismissed the Applicants' suit and entered judgment for the Respondent in terms of the counterclaim. The Applicants were aggrieved with the said judgment and filed a Notice of Appeal on October 7, 2022, and requested proceedings and ruling of the ELC.
  4. The Applicants thereupon filed the instant application dated October 17, 2022, brought pursuant to Rule 5 (2) (b) of the *Court of Appeal Rules*, hereinafter the Rules. It seeks an order of stay of execution of the Judgment and the Decree of the ELC pending the hearing and determination of the intended appeal. The application is supported by the grounds on the face of the Motion and reiterated in the affidavit of Dr. Bernard Onkundi Otundo, the 1<sup>st</sup> Applicant herein, sworn on October 17, 2022.
  5. We heard Mr. Eric Masese learned counsel for the Applicants and Mr. Benjamin Njoroge learned counsel for the Respondent on 22<sup>nd</sup> November 2022, when they orally highlighted their respective written submissions dated October 19, 2022 and October 24, 2022. We have considered the submissions alongside the affidavit and the supplementary affidavit both sworn by Dr. Bernard Onkundi Otundo supporting the application and the replying affidavit and a further affidavit in opposition to the application sworn by Stephen Blanchet a director of the Respondent.
  6. In order to succeed in their prayers in the application, the Applicants are 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. This requirement is prescribed by Rule 5 (2)(b) of the *Rules* and confirmed by this Court in *Halai & Another vs Thornton & Turpin (1963) Ltd.* (1990) KLR 365.
  7. In that regard, the Applicants contend, and their counsel urged that the learned Judge erred in making a finding that the Applicants were in breach of the Agreement and the Supplementary Agreement of Sale, and finding further that the Supplementary Agreement was unenforceable. It was urged that the Applicants paid the entire purchase price in 2012 but that the Respondent continues to enjoy rent from the suit property. The Respondent, and its counsel urged that the Applicants did not have an arguable appeal with bona fide issues; that the Respondent held possession of the suit property on the basis of a contractual lien agreed upon by parties as stipulated under Clause 3(3) of the Supplementary Agreement dated December 15, 2011 pending the payment of the penalty interest on late payments.
  8. 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, we are satisfied, having regard to the complaints set out in the proposed grounds and memorandum of appeal in the Applicants' Supplementary affidavit, that the intended appeal is not frivolous. It is arguable. See *Somak Travels Ltd vs Gladys Aganyo* [2016] eKLR.
  9. On the nugatory aspect, the Applicants contend that the Respondent is an entity that has no known assets and its director Mr. Stephen Blanchett is a British national, and that if he left the country after receiving payment of the decree and the appeal succeeds, the Applicants will not be able to recover the decretal sum from the Respondent. It was urged that the Respondent stood to suffer no prejudice as it had lien over the suit property, and in possession of the suit property.
  10. The Respondent on the other hand urged that the ELC found that even though it was in possession of the suit property, it was not earning anything from that property. Regarding the issue of the Respondent's director being a foreigner, counsel urged that the Respondent Company had a second Director who was a Kenyan. It disclosed that the Applicants had a case with their financier where



they were trying to stay sale of the suit property by the financier, which fact the Applicants had not disclosed. The Respondent’s counsel urged that his client was not opposed to a conditional stay with the Applicants being required to deposit some form of security to secure the Respondent’s interest. The counsel was amenable to a conditional stay of execution on the terms that half of the decretal sum be released to it and the other half be deposited in a joint interest earning account of the parties’ advocates.

11. In light of the positions taken by the two opposing parties on the nugatory issue, and in the circumstances of the case we find that the order that commends itself to us is as follows:

1. The application dated October 17, 2022 be and is hereby allowed on the terms that there shall be a stay of execution of the judgment and decree of the Mombasa ELC No. 14 of 2013 delivered on the September 27, 2022 on condition that the Applicants deposits with this Court the sum of Kshs 6,000, 000/- within 60 days from the date of this ruling.
2. In default of the compliance with order (1) above, the stay orders granted herein will automatically collapse.
3. The costs of the application dated October 17, 2022 shall abide the outcome of the appeal.

**DATED AND DELIVERED AT MOMBASA THIS 12<sup>TH</sup> 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**

