



**Doshi v Chemutut & 7 others (Civil Application  
E004 of 2023) [2023] KECA 654 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KECA 654 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION E004 OF 2023  
SG KAIRU, JW LESSIT & GV ODUNGA, JJA  
JUNE 9, 2023**

**BETWEEN**

**KETAN NAVIVINCHANDRA DOSHI ..... APPLICANT**

**AND**

**HON. JUSTICE CHARLES P. CHEMUTUT ..... 1<sup>ST</sup> RESPONDENT**

**MAUREEN JANET WALKER ..... 2<sup>ND</sup> RESPONDENT**

**PETER WALKER ..... 3<sup>RD</sup> RESPONDENT**

**JACQUELINE JOSEPHINE WANJIKU ..... 4<sup>TH</sup> RESPONDENT**

**MATABABU INVESTMENTS LIMITED ..... 5<sup>TH</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 6<sup>TH</sup> RESPONDENT**

**LAND REGISTRAR ..... 7<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 8<sup>TH</sup> RESPONDENT**

*(An application for orders for stay of execution of the judgment and  
decree of the Environment and Land Court at Malindi delivered  
by M.A. Odeny, J. on 16th February 2023 In ELC No. 136 of 2018)*

**RULING**

1. The Applicant, Ketan Navinchandra Doshi, has by way of a Notice of Motion dated 28<sup>th</sup> February 2023 brought pursuant to section 3(2), 3(A) and 3B of the *Appellate Jurisdiction Act*, Rule 1(2) and Rule 5(2)(b) of the Court of Appeal Rules 2022, seeks stay of execution of the judgment and decree given at the Environment and Land Court at Malindi on 15<sup>th</sup> February 2021 in ELC No. 136 of 2018 pending the hearing and determination of this application and his intended appeal. He also seeks that



the Court grants such other or further orders or directions as it deems just and appropriate in the circumstances of the case.

2. The application is supported by grounds on the face of the application and by the affidavit sworn by the Applicant. The Applicant avers that he was at all material times the registered owner of L.R. Nos. MN/III/4393 and MN/III/4394. He avers that he subdivided the land into subdivision numbers MN/III/4400 to MN/III/4407 which were later on rectified to MN/III/9876 to MN/III/9884. That in May 2006, the 1<sup>st</sup> Third Party, who is the Applicant herein sold three of the sub- divisions, namely MN/III/9882, MN/III/9883 and MN/III/9884 for Kshs 7, 500,000/-. That vide the judgement of the ELC, MN/III/9882 and MN/III/9883 were canceled and the Applicant ordered to refund the purchase price of Kshs 7, 500,000/- to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
3. He averred that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents instituted Third Party proceedings against the Applicant after they were sued by the 1<sup>st</sup> Respondent, who claimed ownership of L.R No. M/N/III/433,434 and 435. That it later on transpired that LR No M/N/III/433,434 and 435, and LR No. MN/III/9876 to MN/III/9884 all occupy the same geographical position on the ground.
4. The Applicant avers that he is discontented by the judgment of the ELC pronounced on 15<sup>th</sup> February 2023. He avers that the 1<sup>st</sup> Respondent did not prove to the required standard that he acquired any lawful interest over the land L.R Nos. MN/III/433,434 and 435. He averred that fraud was neither pleaded nor proved as against the applicant yet the trial judge proceeded to order the cancellation of MN/III/9882 and MN/III/9883 and the reimbursement of the purchase price of Kshs. 7,500,000/- to the 2<sup>nd</sup> and 3<sup>rd</sup> respondent.
5. The applicant further averred that his intended appeal is arguable with reasonable chances of success because the trial judge failed to consider evidence showing that the 1<sup>st</sup> respondent acquired no interest in L.R. Nos. MN/III/433,434 and 435 also that L.R. Nos. MN/III/433,434 ceased to exist by the time any titles to the same were issued to the 1<sup>st</sup> respondent. Further, that the trial court then inverted the incidence and burden of proof set out in section 107 and 108 of the Evidence Act and misconstrued the provisions of the Limitation of Actions Act amongst other errors set out in the draft Memorandum of Appeal annexed to the affidavit in support of the motion.
6. The applicant argued that should the intended appeal succeed and the titles MN/III/9882 and MN/III/9883 are cancelled by the 7<sup>th</sup> Respondent, the Chief Land Registrar herein, and if the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents executed their monetary judgment against the Applicant, the subject matter of the appeal will have dissipated and the appeal will be rendered nugatory. The Applicant further urged that no prejudice will be suffered by the Respondents herein if the execution of the said judgment and decree were stayed as prayed.
7. The 1<sup>st</sup> Respondent in his replying affidavit opposed the application for stay. The 1<sup>st</sup> Respondent contended that the Applicant failed to satisfy the threshold set out under Rule 5(2) (b) of the Court's Rules. He urged that that the applicant has not demonstrated to the satisfaction of this Court that the intended appeal was arguable and that the same would be rendered nugatory in the event that the orders sought are denied. It was contended that the Applicant's supporting affidavit does not raise any justification for grant of stay, and that the application was frivolous and is intent on denying the 1<sup>st</sup> Respondent his lawful right to the fruits of judgment. He urged that the intended appeal will not be rendered nugatory should it ultimately succeed since the suit property is capable of being valued and the Appellant can adequately be compensated by way of damages.



8. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in their submissions conceded that the Applicant had an arguable appeal without substantiating. However, they contended that the appeal will not be rendered nugatory if the stay sought is not granted.
9. The application was heard on the virtual platform on the 21<sup>st</sup> March 2023 where learned counsel Mr. Karega was present holding brief for Ms Wanjiku Mohamed for the Applicant. He relied on the Notice of Motion application and affidavit in support dated 28<sup>th</sup> February 2023, as well as the written submissions dated 12<sup>th</sup> March 2023. Learned counsel Ms. Jacqueline Chepkwony was present for the 1<sup>st</sup> Respondent and relied on the replying affidavit sworn by the 1<sup>st</sup> Respondent dated 8<sup>th</sup> March 2023, the written submissions and list of authorities and Digest of cases of even date. Learned counsel Ms. Baraza appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and relied on the written submissions dated 17<sup>th</sup> March 2023 with the Digest of cases of even date. Learned counsel Mr. Emmanuel Makuto was present for the 8<sup>th</sup> Respondent. He stated that he could not confirm whether anything had been filed on behalf of the 8<sup>th</sup> Respondent. There was no appearance for the 4<sup>th</sup> to 6<sup>th</sup> Respondents despite service with the hearing notice. Mr. Karega informed the Court that the 6<sup>th</sup> Respondent did not participate at the trial.
10. We have considered this application and the rival arguments by counsel for all the parties. The principles that guide consideration of an application of this nature are well settled. For an applicant to succeed he must, firstly demonstrate that the appeal, or intended appeal, as the case may be, is arguable, which is the same as saying that the same is not frivolous. The applicant must in addition show that the appeal would be rendered nugatory if stay was not granted. These principles have been restated and amplified by this Court in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR.
11. Mr. Karega relied on their written submissions that he briefly highlighted before us. Counsel urged that the Appellant had an arguable appeal. He relied on the decision in *Mtwapa EPZ Limited v. Coast Apparel EPZ Limited & Another* (2018) eKLR for the proposition that an arguable appeal need not necessarily succeed. Counsel urged that the learned ELC Judge misconstrued the law of evidence and wrongly shifted the burden of proof against the Applicant. Further that the learned Judge misapplied the principle of first in time.
12. Counsel referred the Court to a copy of the 1<sup>st</sup> Respondent's letter of allotment of land which is on the record and raised issue whether the 1<sup>st</sup> Respondent had any legal interest in the suit land as the offer had lapsed when he claimed he complied with the terms of the offer. He cited the case of *Mcfoy Limited Vs Africa Co. Ltd.* (1961) 3 AII E.R for the proposition that a title whose foundation is a non-existent offer is a nullity.
13. Ms. Chepkwony for the 1<sup>st</sup> Respondent reiterated the position taken in their replying affidavit. The 1<sup>st</sup> Respondent submitted that the Applicant has failed to satisfy the conditions required in granting the orders sought and the settled principles established in the case of *Stanley Kangethe Kinyanjui vs Tony Keter & 5 Others* (2013) eKLR. Counsel urged that the Applicant has not raised a single *bona fide* arguable ground in the annexed Memorandum of Appeal to justify ventilation on appeal. She urged that the title of the Applicant was extinguished in 2006 when he transferred the land to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
14. Ms. Baraza for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents relied on grounds of opposition filed alongside the written submissions. As there is no room for grounds of opposition in the Rules of this Court, we shall consider only what is stated in the written submission. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents conceded that the Applicant had an arguable appeal.



15. We need to point out at the outset that an arguable appeal is not one which must necessarily succeed, but one that is not frivolous and merits to be argued fully. Further, that it is sufficient if the appeal raises only one triable issue. This Court in this regard held as follows in *Somak Travels Ltd vs Gladys Aganyo* [2016] eKLR:

“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. While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application.”

16. The Applicant has annexed a Draft Memorandum of Appeal in which seven grounds are raised. We have considered them. These grounds are in line with the grievances the Applicant has set on the face of the application and the supporting affidavit. There is the issue whether the 1<sup>st</sup> Respondent has any legal interest over the land the subject matter of the appeal having not complied with the terms of offer before they expired. The Applicant raised issue whether compliance could be retrospective. We do find that there are arguable points which include whether there can be retrospective compliance with a condition post the lapse of an offer; whether any interest at all was created through a lapsed offer whose conditions were allegedly never met and thirdly; whether a title whose foundation is allegedly a non-existent offer amounts to a nullity. It is our view that these are not frivolous grounds, and that the Applicant has therefore established the existence of the first limb.

17. On the nugatory aspect, Mr. Karega urged that if the judgment and decree were not stayed and the execution took place, it will result in the titles of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents being cancelled and the Appellant will have to pay the sum of KShs.7,500,000/- plus interest and costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. He urged that if the appeal succeeded he will have lost on the money paid as refund to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and also lose out on the land, thus rendering his appeal nugatory. He urged that if that were to happen, it will put the Applicant in a similar position as that of the Applicant in the case of *Stanley Kangethe Kinyanjui V Tony Ketter & 5 others* [2013] eKLR where the Court of Appeal held as follows:

“....Apart from these pending proceedings, the sale and transfer having been set aside, the applicant who has paid Kshs.53 million towards the purchase of the property and is in possession stands, not only to lose the money but also to be dispossessed of the property by the 1st, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents....”

18. Mr. Karega urged that the Applicant’s proprietorship rights crystalized more than 2 decades ago when his grant was issued to him in 2003. He then lawfully exercised his ownership rights by disposing of the property 17 years ago. The Applicant urged that no amount of damages can make good the taking away of those rights as the very substratum of the intended appeal will have been dissipated, and the execution irreversible.

19. Citing the case of *Reliance Bank Limited v. Norlake Investments Ltd* (2002) 1 EA 227 the 1<sup>st</sup> Respondent submitted that the Applicant failed to demonstrate that he would suffer substantial loss in the event the orders for stay are denied. It was submitted that the Applicant has not stated whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were not in a position to refund the decretal sum of Kshs. 7,500,000/-. In emphasizing that this is a case in which compensation would be adequate, the 1<sup>st</sup> Respondent referred



to the decision in *Kenlink Global Limited & 2 Others vs Paramount Universal Bank Limited* (2021) eKLR. In addition, the 1<sup>st</sup> Respondent submitted that if the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's titles are cancelled the Applicant will not be prejudiced since the impugned judgment has partially been executed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who chose to bring the litigation process to an end by relinquishing possession of the land to the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent submitted that there is nothing to stay since his title was issued by the trial court in Judicial Review No. 3 of 2017 and that the appeal filed in its regard by the 4<sup>th</sup> and 5<sup>th</sup> Respondents challenging the said title has since been withdrawn.

20. Ms. Baraza for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opposed the application on the grounds that being a money decree, the appeal will not be rendered nugatory if the stay sought is not granted. While relying on the case of *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* (2013) eKLR, for the proposition that what will be rendered nugatory will depend with whether what is sought to be prevented, if allowed, will be reversible, and if it is not reversible whether damages will adequately compensate the aggrieved party. It was counsel's submission that what is sought to be prevented was reversible. She urged further that the Applicant had not demonstrated that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents will not be able to refund the decretal amount.
21. We have considered the arguments by the Applicant and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on the second principle of whether the Applicant has shown that the appeal stands to be nugatory unless the stay is ordered. We find that the Applicant has proved this aspect. We are satisfied that if the order sought is not granted and the land is sold, the Applicant stands to lose out on the funds and the land that ought to revert to him upon refund of the funds. We are of the view that damages cannot atone loss of proprietorship of the land. As for the money decree in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent, the Applicant has not demonstrated that the two Respondents will be unable to refund the decretal amount if the appeal were to succeed.
22. We have come to the conclusion that the application dated 28<sup>th</sup> February 2023 succeeds in part as follows:
  - i. The application is allowed in terms of order 3 to the extent that, there should be no dealing or sale of the property the subject matter of the intended appeal pending the hearing and determination of the intended appeal.
  - ii. The stay of execution of the decree as against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents is declined.
  - iii. The costs of the application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF JUNE 2023.**

**S. GATEMBU KAIRU, FCIArb**

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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**

