



**Mwadzaya Wachanda Clan Welfare Registered Trustees & 58 others v Petrol Oil Kenya Ltd & 6 others (Civil Application E016 of 2023) [2023] KECA 940 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 940 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION E016 OF 2023  
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA  
JULY 28, 2023**

**BETWEEN**

**MWADZAYA WACHANDA CLAN WELFARE REGISTERED TRUSTEES & 58  
OTHERS ..... APPLICANT**

**AND**

**PETROL OIL KENYA LTD ..... 1<sup>ST</sup> RESPONDENT  
SAID ZEMBE BADI ..... 2<sup>ND</sup> RESPONDENT  
SALAT ABDULLAHI MOHAMED ..... 3<sup>RD</sup> RESPONDENT  
JAVICK & COMPANY ..... 4<sup>TH</sup> RESPONDENT  
THE LAND REGISTRAR, KILIFI ..... 5<sup>TH</sup> RESPONDENT  
THE DIRECTOR OF SURVEYS ..... 6<sup>TH</sup> RESPONDENT  
THE ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**

*(Being an application for stay of taxation proceedings pending  
Civil Appeal E014 of 2022 the ruling and order of the Hon Justice  
Olola rendered on 30th July, 2021 in Malindi ELC 63 of 2020)*

**RULING**

1. By this Notice of Motion dated April 13, 2023, the Applicants seek that pending the hearing and determination of the appeal from the ruling in Environment and Land Court at Malindi ELC Case 63 of 2020 rendered by Honorable Justice Olola on July 30, 2021, there be a stay of proceedings in the High Court including execution of certificate of costs. The application Page 1 of 9 MLD Civil Application No E016 of 2023 is supported by an affidavit sworn by Mohamed Menza Yama on April 13, 2023.



2. According to the Applicants, following the striking out of their suit on July 30, 2021, and notwithstanding the fact that the 1<sup>st</sup> Respondent's counterclaim was still pending, the 1<sup>st</sup> Respondent filed party and party bill of costs dated September 1, 2021 which was assessed by the Deputy Registrar in the sum of 639,044.00. The Applicants disclosed that they have already filed an appeal before this Court being Civil Appeal No E014 of 2022 challenging the striking out of the said suit. It was further disclosed that in Malindi Civil Application No 55 of 2021, this Court found that the Applicants had an arguable point and granted injunctive orders.
3. According to the Applicants, since their appeal has high chances of success, this Court should stay further proceedings and the execution of the certificate of costs before the Malindi ELC No 63 of 2020 pending the hearing and determination of the pending appeal. It was averred that on December 14, 2022, the Land Registrar registered MLD Civil Application No E016 of 2023 inhibition orders on properties known as Madzimbani/Mitangoni/170, 185 and 202 belonging to William Mulai Kinyama, Shadrack Kinyama Katana and the deponent herein. However, the said properties do not belong to the Applicant. It was further averred that notwithstanding the existence of the injunctive orders, the Applicant had commenced execution against the properties of the trustees of the applicant. The Applicant was therefore apprehensive that unless the orders sought herein are granted, the Respondents would proceed with the execution and thus render the appeal, which is pending directions, nugatory. According to the Applicants, no prejudice is likely to be occasioned to the Respondents by the grant of the orders sought herein as the Respondents will participate in the appeal proceedings.
4. In opposing the appeal, the 1<sup>st</sup> Respondent relied on the replying affidavit sworn by Benjamin Kingori, the 1<sup>st</sup> Respondent's Chief Executive Officer on May 4, 2023. According to him, notwithstanding the assessment of the 1<sup>st</sup> Respondent's costs, the Applicants neither objected to MLD Civil Application No E016 of 2023 nor filed a reference against the decision. It was disclosed that the Applicants made three applications before the ELC seeking stay of execution one of which was dated May 23, 2022 and which was dismissed on the ground that no attempts were made to challenge the decision on taxation of costs. With regard to the two applications dated March 3, 2023, which sought orders similar to the ones sought in the application dated May 23, 2022, it was disclosed that the same were argued and the rulings thereon were due for delivery on June 14, 2023. According to the deponent, the Applicants filed this application during the pendency of the said ruling without waiting for their outcome.
5. According to the 1<sup>st</sup> Respondent, since the Applicant has already moved this Court for orders under rule 5(2)(b) of this *Court's Rules*, the jurisdiction of this Court is now spent and cannot be invoked a second time. It was contended that the Applicants are abusing the process of this Court while they continue with their invasion of the 1<sup>st</sup> Respondents property without justification. It was therefore sought that the instant application be dismissed with costs.
6. We heard this application vide this Court's virtual platform on June 6, 2023 during which Learned Counsel Mr Ondabu appeared for the Applicants, Mr Gikandi Ngubuini appeared for the 1<sup>st</sup> Respondent while Mr Ojwang Gabriel appeared for the 5<sup>th</sup> to 7<sup>th</sup> Respondents. The 2<sup>nd</sup> to 4<sup>th</sup> Respondents, though served, were not represented.
7. At the hearing Mr Ondabu relied on his submissions dated April 18, 2023. According to the Applicants, this Court in Malindi Civil Application No 55 of 2021 already found that the appeal is arguable. It was submitted that since there is still a pending counterclaim by the 1<sup>st</sup> Respondent, there is no decree in existence capable of being executed hence the execution is irregular. According to the Applicants executing for the costs during the pendency of the appeal would place the Applicants in



a precarious position and that the execution against the properties of the trustees of the applicant is itself improper.

8. On behalf of the 1<sup>st</sup> Respondent, the matters deposed to in the replying affidavit were reiterated and it was argued that the Applicants failed to prove that the appeal was arguable in light of their failure to challenge the certificate of costs. There were no submissions made on behalf of the 5<sup>th</sup> to the 7th Respondents.

### **Analysis and Determination**

9. We have considered the application, the affidavits both in support of and in opposition to the application, the submissions made and the authorities cited.
10. There are two requirements that need to be met by the Applicants herein, so as to obtain the relief sought in this application. The first requirement is that the Applicants need to demonstrate that they have an arguable appeal, and second that the said appeal will be rendered nugatory if the order sought is not granted. See *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR.
11. In this case, it is clear that what is sought to be stayed are proceedings and execution arising from those proceedings. The only reason however, why the proceedings are sought to be stayed is that the 1<sup>st</sup> Respondent intends to proceed with the taxation of its certified costs. It is however clear that no objection to the said taxation of costs was made and no reference was filed against the said taxation. In addition, there is no appeal pending before us against the said taxation. The law is that where the application for stay is directed at a decision against which an appeal or an intended appeal is not directed, a stay of execution pending that appeal, is not available and the application is rendered incompetent on that score. The reason for this is that this Court's jurisdiction to stay a decision is only triggered upon the giving of a notice of appeal against the decision sought to be stayed has been filed. In other words, one cannot appeal against one decision and seek to stay a totally different decision. That is the gist of the decision in *Nairobi City Council vs Resley* [2002] EA 494 in which it was held that:

“There is no provision for allowing a notice of appeal lodged in a later decision to be used in an application for stay of execution of an earlier decision...It is trite law that without a notice of appeal against particular orders, we would have no Jurisdiction to grant a stay of those orders and we cannot, therefore accept Mr Oduol's argument to the effect that the notice of appeal against the ruling of April 11, 2002 entitles him to apply for a stay of execution of orders made on March 11, 2002...In this matter, the notice of appeal relates to the decision of the High Court given on December 2, 2010 dismissing the application for review. The order for stay that is sought is in relation to the Judgment delivered on December 2, 2009 No appeal has been preferred against that judgment.”

See also *Muhamed Yakub & another vs Mrs Badur Nasa* Civil Application No Nai 285 of 1999.

12. The issue raised in this application regarding the execution against the properties of the trustees as opposed to the Applicants' is, in our view, a matter for objection proceedings rather than for stay pending an appeal. As regards the execution before a decree is filed, we only wish to refer the Applicant to Section 34 of the *Civil Procedure Act* which states that questions ought to be determined by the Court executing the decree.
13. We also agree with the Respondents that in light of the fact that this Motion was filed during the pendency of a similar application seeking similar orders which was pending ruling, the Applicants are guilty of abuse of the process of the Court.



14. We have said enough to show that the Notice of Motion dated April 13, 2023 lacks merit. It is hereby dismissed with costs to the 1<sup>st</sup> Respondent.

15. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF JULY, 2023.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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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**

