



**Yusuf v Tora & 3 others (Civil Application E022 of 2023)
[2023] KECA 973 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 973 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E022 OF 2023
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
JULY 28, 2023**

BETWEEN

MOHAMED DAUDI YUSUF APPLICANT

AND

RUKIA ISMAEL TORA 1ST RESPONDENT

THE COUNTY LAND REGISTRAR, LAMU 2ND RESPONDENT

THE NATIONAL LAND COMMISSION 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

(An application for an injunction and or stay of the orders of the High Court of Kenya at Malindi pending the lodging, hearing and determination of an intended appeal from the judgment of the High Court at Malindi (Dr. A. Odeny J.) delivered on 20th April 2022 in Malindi ELC Case No. 216 of 2015)

RULING

1. The applicant herein, Mohamed Daudi Yusuf is by a notice of motion dated May 17, 2023 seeking orders of injunction to restrain Rukia Ismael Tora, the County Land Registrar-Lamu, the National Land Commission and the Hon Attorney General, the 1st to 4th Respondents herein, from entering, selling and handling the suit property known as Title No Lamu/Pate Settlement Scheme/ 1401 pending the hearing and determination of his intended appeal against the judgment and decree in Malindi Environment and Land Court Civil Case No 216 of 2015, and that the status quo prevailing as at the date of the said judgment is maintained to preserve the subject of the appeal.
2. The Applicant states that he filed the suit in Malindi Environment and Land Court Civil Case No 216 of 2015, claiming ownership rights over the parcel of land known as Lamu/Pate Settlement Scheme/ 827 which originally measured 2 acres, and challenged the title issued to the 1st Respondent being



Lamu/Pate Settlement Scheme/1401 on account of having been issued fraudulently or irregularly after subdivision of the title No Lamu/Pate Settlement Scheme/ 827. However, that the Malindi Environment and Land Court (Dr Odeny J) delivered a judgment on April 20, 2022 dismissing the suit, which the Applicant intends to appeal before this Court and has applied for certified copies of typed proceedings, judgment and decree for purposes of the said appeal. That there is thus imminent danger that the 1st respondent may intermeddle with the subject of the appeal which would render the appeal nugatory. The applicant annexed a copy of the said judgment, his notice of appeal and draft memorandum of appeal.

3. The Applicant has in this respect raised four (4) ground of appeal in his draft memorandum of appeal, namely:
 1. That the Hon Judge erred in law and in fact by failing to appreciate that the Appellant had proven that he had bought two acres from the 1st Respondent as delineated in the original map which was provided as evidence in court.
 2. That the Honourable Judge failed in law and in fact by failing to appreciate that the map that had split the two acres into two portion of 1 acre each being Lamu/ Pate Settlement Scheme/ 827 and Lamu/ Pate Settlement Scheme/ 1401 were manipulated to create room for the fraudulent subdivision of the Appellant's plot.
 3. That the Hon Judge erred in law and in fact by failing to appreciate that the 1st Respondent demeanour and conducts of denying her own agreement which the Court found to be valid and property signed by the 1st Defendant depicted her as an untruthful person and could not be believed and her evidence was therefore incredible
 4. That the Hon Judge failed in law and in fact by making a finding that the Appellant had not objected to the register in accordance with the Adjudication Act when the 1st Respondent had initiated an objection which was properly heard by the adjudication committee and a ruling made in favour of the Appellant and therefore there was nothing for the Appellant to object.
4. The 1st Respondent opposed the application in a Replying affidavit she swore on June 7, 2023 and averred that the order sought was ludicrous for the reason that she was the registered owner of Lamu/ Pate Settlement Scheme/1401 and had been in occupation thereof and to restrain her would amount to dispossessing her of her home which would amount to an injustice for which she could never be recompensed. She stated that the Applicant's case was that he entered into an agreement with her in the year 1999 for the sale of unsurveyed land which was later surveyed and registered as. Lamu/ Pate Settlement Scheme/ 827 Further, that the Applicant pleaded that the unsurveyed property was measured using the older method of foot measurement and he believed it to amount to 2 acres, and was aggrieved to find out when he was issued with a title deed for Lamu/ Pate Settlement Scheme/ 827 which it was one (1) acre. Therefore, that his contention was that the one (1) acre titled issued to the 1st Respondent, being Lamu/ Pate Settlement Scheme/ 1401 ought to have formed part of his property and thus claimed for cancellation of the title.
5. Further, that the Applicant did not plead that the titles were issued after an elaborate adjudication process. Accordingly, that the memorandum of appeal did not disclose an arguable appeal because the *Land Adjudication Act* provided an elaborate adjudication and appeal mechanism and that under section 26 of the Act, one had the option of appealing to Adjudication Officer within 60 days of the adjudication register being created and if aggrieved by the outcome, to appeal under section 29 to the Minister.



6. On the second limb, it was the 1st Respondent's assertion that the Applicant had not met the criteria and the orders sought would restrain her from property that she possessed and was in her name and the effect of the order, if granted, would be disruptive rather than conservatory. Therefore, the appeal would not be rendered nugatory if allowed continued use and occupation of her property, a *status quo* that had prevailed all along and thus it was in the interest of justice that the application be disallowed.
7. The 2nd and 4th Respondent filed grounds of opposition to the application dated June 6, 2023 and stated that the Applicant had failed to satisfy the prerequisite set out under rule 5 (2)(b) of the [Court of the Appeal Rules](#) by failing to demonstrate that its appeal will be rendered nugatory unless an order for stay pending execution is granted and that the application was frivolous, vexatious or otherwise an abuse of the process of this Court.
8. We heard the application on the Court's virtual platform on June 13, 2023. Learned counsel Ms Marubu appeared for the Applicant while learned counsel Mr Origi Owino, appeared for the 1st Respondent, and learned counsel Mr Mkala, holding brief for learned counsel Mr Munga, appeared for the 2nd and 4th Respondents. There was no appearance by the 3rd Respondent despite their advocates having been duly served with hearing notice. The counsel present highlighted their submissions dated June 8, 2023, June 9, 2023 and June 6, 2023 respectively, and reiterated the averments made by the parties their respective pleadings.
9. Ms Marubu in addition submitted that the Applicant had filed his Notice of Appeal and annexed a draft memorandum of appeal showing that the appeal was arguable with high chances of success and that it was prudent for the subject to be preserved pending the appeal. Counsel placed reliance on the case of [Fatma Abdi vs Kuro Lengesen and Another \[2021\] eKLR](#), which discussed in detail the meaning of *status quo* in comparison to stay and injunction orders to submit that the orders ought to issue to preserve the subject and render the intended appeal relevant and not nugatory.
10. Mr Owino on his part placed the reliance on the case of [Njata & 15 others v Gatheca & another \(Civil Appeal No E788 of 2022\) \[2023\] KECA 516 \(KLR\) \(12 May 2023\) \(Ruling\)](#) on the guiding principles for the grant of an injunction pending appeal, and urged that all the claims made by the Applicant were antecedent to the issuance of the final register in the adjudication process, and his appeal was not arguable as did not exhaust the process provided for under the [Land Adjudication Act](#) as found by the trial Court. The counsel reiterated that the motion as framed was defective since it intended to disrupt a status quo that the 1st Respondent claimed subsisted for more than 25 years and would amount to dispossessing her the Applicant had not met the criteria and the appeal would not be rendered nugatory.
11. Mr Mkala referenced the cases of [Multimedia University & another v Professor Gitile N Naituli \[2014\] eKLR](#) and [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another \[2006\] eKLR](#) and [Kenya Industrial Estate Limited & another vs Matilda Tenge Mwachia \[2021\] eKLR](#) with regards to what the Applicant was required to demonstrate, and conceded that the Applicant had an arguable appeal. On the question of whether the appeal would be rendered nugatory, he submitted the judgment was in favour of the 1st Respondent and the resultant decree was a negative order, and that if the Applicant were to succeed in the appeal, he could be reasonably be compensated through damages.
12. The applicable principles in the exercise of the Court's unfettered discretion under Rule 5(2) (b) of the [Court of Appeal Rules of 2022](#) to grant an order of injunction pending appeal are well settled. Firstly, an applicant has to satisfy that he or she has an arguable appeal. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in [Stanley Kangethe Kinyanjui vs Tony Ketter](#)



§ 5 others [2013] eKLR. We need to point out that an arguable appeal is not one which must necessarily succeed, but one which is not frivolous and merits to be argued fully. Further, that it is sufficient if the appeal raises only one triable issue. The Applicant in this regards raises the issue of the legality of the findings made by the Environment and Land Court as regards the process of subdivision of the suit property and his objection under the Land Adjudication Act, which in our view are not frivolous issues and merit consideration. To this extent we find that the intended appeal is arguable.

13. On the nugatory aspect, it was held in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* (supra) that whether or not an appeal will be rendered nugatory depends on whether or not what is ought to be stayed or injuncted, if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. We refer to the observations made in *Reliance Bank Limited vs Norlake Investment Limited* [2002] 1 EA 227 that the factors which render an appeal nugatory are to be considered within the circumstances of each case and in so doing the court is bound to consider the conflicting claims of both sides. The Applicant has stated that he will suffer irreparable loss and harm owing to the fact that the suit property maybe sold. The question we must consider is whether damages would be available as adequate compensation, and in this respect we note that the 1st Respondent, who is the registered owner of the suit property, did not indicate whether or not she will be able to compensate the Applicant in damages in the event his appeal is successful.
14. We accordingly find the application dated May 17, 2023 is be merited only to the extent that the 1st Respondent is restrained from selling or otherwise disposing of the suit property known as Title No Lamu/Pate Settlement Scheme/ 1401 pending the hearing and determination of the intended appeal against the judgment and decree in Malindi Environment and Land Court Civil Case No 216 of 2015. Given the circumstances giving rise to the notice of motion application dated May 17, 2023, there shall be no order as to the costs of the application.
15. It is so ordered

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 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

