



Otundo & 5 others v Creek Development & Development Limited (Civil Application E069 of 2022) [2023] KECA 1225 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KECA 1225 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E069 OF 2022
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
OCTOBER 6, 2023**

BETWEEN

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

AND

CREEK DEVELOPMENT & DEVELOPMENT LIMITED RESPONDENT

*(An application for review of the ruling and orders of this Court
(Nyamweya, Lessit & Odunga JJ. A) delivered herein on 12th May 2023)*

RULING

1. On 12th May 2023, this Court delivered a ruling on an application made by the Applicants herein, in which they sought an order of stay of execution of the judgment and the decree of the Environment and Land Court (ELC) in Mombasa ELC Case No 14 of 2013, pending the hearing and determination of their intended appeal. The Applicants had filed a case before the ELC seeking vacant possession of the suit property, being Mtwapa/Kilifi/403, and mesne profits from the Respondent. The Respondent, in its defence and counter claim sought 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. The ELC (Matheka J.), in its judgment delivered on 27th September 2022, 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 7th October 2022 and an application dated 17th October 2022 for stay of execution of the judgment.

2. This Court after considering the said application, made the following orders:

1. The application dated 17th October 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 27th September 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 17th October 2022 shall abide the outcome of the appeal.

3. The Applicants have now filed another application dated 8th June 2023, seeking a review of the said ruling and orders, so as to allow the Applicants to deposit a sum of Kshs. 1,000,000 as a condition for the grant of the stay of execution of the Judgement and Decree in Mombasa ELC Case No 14 of 2013, or in the alternative to deposit a title in lieu of deposit of money as a condition for the grant of stay of execution, and that the Court be pleased to enlarge time for the compliance with its orders made on 12th May 2023.

4. The main grounds for the application, which as set out on its face and in a supporting affidavit sworn by the 1st Applicant, are that the Applicants individually came together as an investment group to purchase the suit property with a view to developing and selling the same, and obtained financing to complete the purchase of the above property. That the Applicants are in a financial predicament and are unable to satisfy the onerous requirement by the Court, as they have been servicing a mortgage in respect to acquisition of the suit property, yet they have never been able to realize their investment as the Respondent continues in occupation and possession of the same to their detriment. Lastly, that to require the

Applicants to deposit the said colossal amount before they can litigate their appeal would amount to denying them access to justice.

5. These grounds were reiterated in written submissions dated 13th June 2023 that were highlighted by Mr. Masese, the learned counsel for the Applicants during the hearing of the application held on 4th July 2023 on this Court's virtual platform. The counsel relied on the decision in the case of *Benjob Amalgamated & anor v KCB Limited* [2014] eKLR on the Court's residual jurisdiction to review its orders, and submitted that in the event that the orders of stay are not varied, the Respondent shall execute the decree and render the Applicants' appeal nugatory.

6. The Respondent opposed the application in a replying affidavit sworn on by its Director, one Stephen Blanchet, and by written submissions dated 29th June 2023, that were highlighted during the hearing by its learned counsel, Mr. Njoroge. The Respondent's position is that the application is an appeal from this Court's ruling which is disguised as an application for review, that the Applicants were under a duty to place all facts and materials to guide this Court in exercise of its discretion in setting conditions for a grant of stay of execution pending appeal and cannot fault this Court for the conditions it set to be fulfilled,; that the Applicants have failed to place such materials or evidence before the Court to demonstrate that they have no means to raise the security ordered; and that the Applicants have not placed any title, spousal consent or valuation of any property that they wish to deposit with the Court.

7. Therefore, that there is no basis to reduce the amount ordered to be deposited from the sum of Kshs. 6,000,000/= to the sum of Kshs.1,000,000/= when the amount now due as per the ELC judgement



stands at Kshs. 8,082,381.40 / =, and that it is now an afterthought that the Applicants, being persons of means, paint themselves as impecunious and financially embarrassed, and are buying time to ensure that their appeal is heard and determined, without complying with the orders of this Court.

8. Counsel for the Respondent therefore submitted that no good or any grounds have been demonstrated to warrant this Court to exercise its residual jurisdiction to order review as was stated in the cases of *Ushago Diani investment Limited v Jabeen Manan Abdulwahab* (2019) eKLR and *Godfrey Karume v Kilimo Shutu & 6 others* (2020) eKLR.
9. The counsel for the Applicants and Respondent have both acknowledged this Court's residual jurisdiction to review its own orders and cited various decisions in this regard. Rule 1(2) of the *Court of Appeal Rules of 2022* provides that this Court has the inherent power to make any orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court, and was the subject of the decision in *Benjob Amalgamated Limited & another v Kenya Commercial Bank Limited* [2014] eKLR, where this Court held that:

“The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable...”
10. In addition, the Supreme Court of Kenya while re-affirming the decision in *Benjob Amalgamated Ltd. & Another vs Kenya Commercial Bank Ltd* (*supra*), held in *Menginya Salim Murgani v Kenya Revenue Authority* [2014] eKLR that this Court is to take into account the principles of finality and justice in determining whether to exercise the residual jurisdiction.
11. In the instant application, it is notable that this Court is being asked to review the conditions attached to the orders of stay of execution, which the Applicants have alleged to be onerous. While bearing in mind that this Court is being asked to exercise an exceptional jurisdiction in this regard, and of the need to exercise caution, the question we need to answer is whether the Applicants have met the required threshold, namely the establishment of fraud, bias, or other injustice. The main consideration that informed the imposition of the conditions on security for the stay of execution in the ruling delivered by this Court on 12th May 2023 was the fact that the Respondent had a money judgment in its favour in Mombasa ELC Case No 14 of 2013, which it has alleged in its pleadings is now stands at Kshs. 8,082,381.40 / = and was not opposed to a conditional stay with the Applicants being required to deposit some form of security to secure its interest in this regard. The Applicants ought to have addressed their ability or otherwise to provide any security at the hearing of the application for stay of execution, and to allow them to raise any new facts at this stage would be to grant them a second bite at the cherry, and would be unfair to the Respondent.
12. Lastly, it is notable that the Applicants have not alleged any fraud or bias, and their main ground is that they will be denied access to justice. We are of the view that provision of security is necessary in order to balance the Respondent's interest and the Applicants' right to appeal, and also to ensure expeditious hearing of the appeal in the circumstances of this application.



We are therefore of the view that there was no injustice caused by requirement for security and the amount of security set by this Court in its ruling delivered on 12th May 2023. We however note that the Applicants are willing to offer a title of equivalent value as security, and counsel for the Respondent's only objection in this regard was that no such title or valuation thereof was provided by the Applicants. We therefore do not see any prejudice that will be caused to the Respondent if such title is availed by the Applicants as security in place of the sum of Kshs 6,000,000/=, with an assurance as to its value.

13. We will therefore only review our ruling by substituting the nature of security that the Applicants shall provide. The orders granted on 12th May 2023 are accordingly reviewed to the extent of the following orders:

1. The application dated 17th October 2022 is 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 27th September 2022 on condition that the Applicants shall, within 60 days from the date of this ruling, deposit with this Court a valid certificate of title to land, and a current valuation report of the said title so as to secure the decretal sum of Kshs. 6,540, 000/-.
2. In default of the compliance with order (1) above, the stay orders granted on 12th May 2023 will automatically collapse.
3. The costs of the applications dated 17th October 2022 and 8th June 2023 shall abide the outcome of the appeal.

14. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF OCTOBER, 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

DEPUTY REGISTRAR

