



**Kandie v Lekakeny (Civil Application E 094 of 2021)
[2022] KECA 447 (KLR) (18 March 2022) (Ruling)**

Neutral citation: [2022] KECA 447 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E 094 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MARCH 18, 2022**

BETWEEN

DAVID KIPKURUI KANDIE APPLICANT

AND

JOHN LEMISO OLE LEKAKENY RESPONDENT

*(Application for orders of status quo and injunction pending an appeal
from the judgment of the Environment and Land Court (Yano J.)
delivered on 21st September 2021 in Mombasa ELC Case No. 126 of 2019)*

RULING

1. The Notice of Motion application before this Court is dated 8th December 2021, and is brought by the Applicant herein pursuant to Rule 5(2)(b) of the *Court of Appeal Rules*. The Applicant seeks an order of status quo to preserve the subject matter of the appeal being Mombasa Municipality Block XXVI/212 (hereinafter “the suit property”), and an order of injunction restraining the Respondent from dispossessing the Applicant of title and/or possession of the said property pending the hearing and determination of the intended appeal. The application is supported by affidavit sworn on 8th December 2021 by the Applicant.
2. The Applicant’s case is that he is the current registered owner and is in possession of the disputed property by virtue of a judgment of the Environment and Land Court (ELC) delivered in Mombasa ELC Case No. 22 of 2012 on 15th February 2019. Further, that the Respondent was the vendor of the suit property and received the entire purchase price. However, that on 21st September 2021, a judgment was delivered in Mombasa ELC Case No. 126 of 2019, which varied the judgment in Mombasa ELC Case No. 22 of 2012, and ordered the cancellation of the Applicant’s title. The Applicant also informed us that there is an appeal pending in this Court, namely Civil Appeal No 88 of 2019 brought by a third party against the judgment delivered in Mombasa ELC Case No. 22 of 2012. The Applicant



is therefore apprehensive that unless the orders sought are granted, he will permanently lose the suit property and the purchase price which he insists he paid in full. Further, that no prejudice will be occasioned to the Respondent if the orders sought are granted.

3. The Respondent's reply, in his affidavit sworn on 15th December 2021, is that by a sale agreement dated 7th January 2010, as a vendor, he indeed sold and transferred the suit property to the Applicant for a purchase price of Kshs.10,000,000/-. However, that the Applicant did not honour his commitment, and instead paid a sum of Kshs.300,000/- which was less than 10% of the purchase price. As a result, the agreement was vitiated and the ELC did establish that the Applicant did not pay the entire purchase price and granted orders in the Respondent's favour. In the absence of any stay of the said judgment, the Land Registrar, Mombasa was under legal obligation to comply with the Court's decree and effect the appropriate entries, cancellations and has since issued the Respondent with the title documents to the suit property, which has been sold to a third party.
4. The Respondent prayed that the Applicant's intended appeal was not arguable and did not stand any chance of success based on the analysis of the evidence tendered and the well-reasoned judgment of the trial Court, and litigation must come to an end. He maintained that he was a man of means and is willing, able and ready to compensate the Applicant in the event he succeeds in his appeal.
5. We heard the application on 26th January 2022, and learned counsel Mr. Ondabu holding brief for Mr. Mwadzoyo was present for the Applicant, while learned counsel Mr. Kurauka appeared for the Respondent. Mr. Ondabu submitted that the issue of payment of the purchase price was an arguable one to be determined by this Court, and prayed for the suit property to be preserved since the Respondent had the intention of selling it, which would render the appeal nugatory. Mr. Kurauka on the other hand was of the opinion that the appeal was not arguable and was frivolous, as there was no proof of the purchase price being paid. Besides, that the application had been overtaken by events as the suit property had been sold to a 3rd Party after the decree was issued and the Land Registrar issued the title in the Respondent's name.
6. The principles applicable in the exercise of the Court's unfettered discretion under Rule 5(2) (b) to grant an order of stay are well settled. First, for an application for stay to be competently before this Court under the said Rule, and as held in *Halai & Another vs Thornton & Turpin (1963) Ltd. (1990) KLR 365*, an applicant must lodge a Notice of Appeal against the judgment intended to be appealed against within 14 days of delivery of the judgment pursuant to Rule 75 of this Court's rules.
7. In the instant application, the Applicant avers that he is appealing against the judgment delivered by the ELC (Yano J.) on 21st September 2021 in Mombasa ELC Case No. 126 of 2019, and annexed a draft memorandum of appeal against the said judgment. We have perused the copy of the Notice of Appeal annexed to the Applicant's affidavit as exhibit "DKK-1", and note that it is dated 3rd February 2020 and lodged on 5th February 2020, and appeals against a ruling delivered on 30th January 2020 in Mombasa ELC Case No. 126 of 2019. The Applicant has however not exhibited any Notice of Appeal lodged within the required time against the judgment of 21st September 2021 as required by Rule 5(2) (b) of this Court's Rules.
8. In the circumstances, as this Court is not properly seized of the instant application, we cannot proceed with a determination as to whether the Applicant has satisfied the applicable principles set out in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR* as to whether he has an arguable appeal, and if so, whether the intended appeal would be rendered nugatory if an order of stay is not granted. The application dated 8th December 2021 is accordingly found to be incompetent, and is hereby struck out with costs to the Respondent.



9. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MARCH 2022.

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

