



REPUBLIC OF KENYA



Mwadzaya Wachanda Clan Welfare Registered Trustees & 58 others v Petro Oil Kenya Ltd & 6 others (Civil Application E055 of 2021) [2022] KECA 402 (KLR) (4 March 2022) (Ruling)

Neutral citation: [2022] KECA 402 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E055 OF 2021
SG KAIRU, JW LESSIT & P NYAMWEYA, JJA
MARCH 4, 2022**

BETWEEN

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

AND

**PETRO OIL KENYA LTD 1ST RESPONDENT
SAID ZEMBE BADI 2ND RESPONDENT
SALAT ABDULLAHI MOHAMMED 3RD RESPONDENT
JAVICK & COMPANY 4TH RESPONDENT
LAND REGISTRAR, KILIFI 5TH RESPONDENT
DIRECTOR OF SURVEYS 6TH RESPONDENT
ATTORNEY GENERAL 7TH RESPONDENT**

(An application brought under Rule 5 (2) (b) for status quo and injunction orders pending the hearing of the intended appeal against the ruling and order of the Environment and Land Court at Malindi (Olola, J.) delivered on 30th July 2021 in ELC Case No E063 of 2020)

RULING

1. The Notice of Motion before this Court for ruling is dated 18th August 2021, and is brought pursuant to Rule 5(2) (b) of the *Court of Appeal Rules* by the Applicants herein, who are seeking two orders. The first is a status quo order to preserve the parties' current subsisting rights of possession and occupation of the land and that the Respondents hold the certificate of titles and preserve the subject matter pending the hearing and determination of the appeal. The second is an order of injunction restraining all the Respondents from selling, transferring, constructing, evicting and/or in any manner



- dispossessing the Applicants of the title to and/or possession of the suit property pending the hearing and determination of the appeal.
2. The application is supported by two affidavits sworn on behalf of the Applicants on 18th August 2021 and 29th October 2021 by Mohamed Menza Yama, the 2nd Applicant. The Applicants' case is that the 1st Respondent issued Notice of eviction for them to vacate plot number Kilifi/Madzimbani/Mitangoni/835 and 841 and they filed a suit in the Environment and Land Court namely Malindi ELC Case No E063 of 2020 and an application therein dated 18th August 2020 seeking for an order of injunction. However, by a ruling dated 30th July 2021 the ELC struck out the Applicants' suit, after finding merit in a Preliminary Objection filed by the 1st Respondent that the suit was res judicata, and discharged interim orders of status quo it had granted. Therefore, that the 1st Respondent is likely to resort to the earlier action of evicting the Applicants. The Applicants' aver that together with their families, they had been in occupation of the suit land, where they have built their homes.
 2. The Applicants annexed copies of the pleadings filed in Malindi ELC Case No. E063 of 2020, the impugned ruling and order issued therein on 30th July 2021, the Notice of Appeal against the said ruling dated 2nd August 2021 and lodged in the Court on 12th August 2021, and its memorandum of appeal dated 18th August 2021. Having lodged the Notice of Appeal within 14 days of the ruling pursuant to Rule 75 of the Court of Appeal Rules, this court is properly seized of the application, as prescribed by Rule 5 (2)(b) and held in *Halai & Another vs Thornton & Turpin (1963) Ltd. (1990) KLR 365*.
 4. The 1st Respondent filed a replying affidavit and further affidavit in response, dated 15th September 2021 and 3rd December 2021, and sworn by Benjamin King'ori, its Chief Executive Officer. The 1st Respondent's case is that it is the registered proprietor of the suit properties and had a fundamental right under Article 40 of the Constitution to enjoy full use and occupation of the said properties, and is being denied the fruits of judgement in its favour in ELC 63 of 2020. In addition, that the subject suit is res judicata and sub judice. According to the 1st Respondent, most of the applicants had moved to the land that was adjudicated to them and as a result had no claim over Kilifi/Madzimbani/Mitangoni/835 and 841, and it was refuted that the Applicants would suffer loss if evicted from the suit land for they are trespassers.
 5. The 1st Respondent prayed that the instant application be dismissed with costs and if allowed, though it will cause it to suffer grave and irreparable loss, then certain conditions to be imposed, namely: first, the Applicant deposit in court the sum of Kshs. 6,500,000/- being the amount claimed in the Bill of Costs; second, the Applicants be ordered to deposit Kshs.12,400,000/- within a specified period, as a condition to grant the said application, and finally, erection of a perimeter fence to avoid any other squatters moving onto the suit property.
 6. The background to the suit is that the applicants claim to be the owners of the parcel of land described as Kilifi/Madzimbani/Mitangoni/160 which has now been sub-divided into Kilifi/Madzimbani/Mitangoni/834, 836, 841, 842, 843, 851 and 852. The appellants claimed that they had been in occupation and possession of the suit land since pre-independence times and that during the process of land adjudication in their area, a temporary Certificate of Title was issued in the name of one Mgandi Mambo Mgandi (now deceased) and Saidi Zembe Badi (the 2nd Respondent) for the suit property; and the said Mgandi Mambo Mgandi held their interest in the land in trust for their Wachanda Clan while the 2nd Respondent had a small portion which was marked out and held on behalf of himself and his extended family. The Applicants claimed that the 2nd Respondent had secretly sub-divided the land and sold portions thereof to the 1st, 3rd and 4th Respondents and that titles had been issued to them in collusion with the 5th to 7th Respondents.



7. In response to the suit, the 1st Respondent averred that the suit was barred by the doctrine of res judicata in view of the fact that the suit land was the subject of 7 suits that had already been heard and determined, which it detailed in its pleadings filed in the ELC and in this application.
8. When the matter came for hearing on 7th of December 2021, Mr. Ondabu learned counsel for the Applicant and Mr. Gikandi, learned counsel for the 1st Respondent, were present. The Court was informed that the 3rd to 7th Respondents had not been participating in the matter, though all parties had been served.
9. Mr. Ondabu, relied on his written submissions dated 30th August 2021, in which reference was made to the case of Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 others, Civil Application No. Nai 31 of 2012 for the proposition that in dealing with Rule 5 (2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the judge's decision to this Court. The case of *Commissioner of Customs vs Anil Dosbi [2007] eKLR* was also cited for the position that the appeal needs even one arguable point for it to be termed arguable, while the case of *Kenya Power & Lighting Company limited v George Joseph Kang'ethe & another [2020] eKLR* was cited for the factors that can render an appeal nugatory. Mr. Ondabu urged that the 6 grounds set out in the draft memorandum of appeal speak to the arguability of the appeal. On the nugatory test, it was argued that the applicants will lose their right to possession, control and management of the suit land to the respondents. It was added that public interest demands the grant of the application.
10. Mr. Gikandi, on the other hand while relying on written submissions dated 29th October 2021, opposed the application on the basis that this Court did not have jurisdiction to grant the orders sought, and the Applicants did not cite any law that empowered Court to grant an order for the preservation of status quo, as a primary substantive order, and that under Rule 5 (2) (b) of the Court of Appeal Rules, the Court is only empowered to grant a stay of execution or an order of injunction. They cited the case of *Owners of Motor Vessel "Lillian S" v Caltex Oil (K) Ltd and Aprim Consultants v Parliamentary Service Commission & Another and the Public Procurement Administrative Board; Civil Appeal No E039 of 2021*, in support of the submissions on jurisdiction. It was further urged that the Applicants did not specify the status quo that they seek to maintain, and have not indicated the identity of the land over which the orders of court are to apply.
11. According to counsel, the Applicants have not demonstrated that they have an arguable appeal and instead have abused the court process by presenting the application. Reliance was placed on the case of *Bruce Joseph Bockle vs Coquero Limited [2014] eKLR* for the holding that a purchaser of land is entitled to absolute ownership, and the case of *RWW vs EKW [2019] eKLR* for the proposition that the Applicants as trespassers and invaders should not be allowed to derive an advantage out of their illegal actions. Learned counsel offered to accept security for costs of Kshs.12,400,000/-, and was agreeable that the Applicants in occupation of the suit land be allowed to access the same but not to undertake construction. Counsel also proposed that the areas of the suit land not in occupation be used by the 1st respondent without any interference.
12. We have considered the arguments and submissions canvassed by the Applicants and 1st Respondent. Mr. Gikandi has raised the preliminary issue of this Court's jurisdiction to grant the orders sought. It is notable in this regard that the Court's powers and discretion under Rule 5 (2)(b) is wide and this Court can order a stay of execution, injunction or stay of further proceedings on such terms as the Court deems just. Status quo orders preserve the subject matter of litigation pending the hearing of a suit or appeal, and are therefore a species of stay orders and fall within the ambit of Rule 5(2)(b). The power of this Court to grant status quo orders has been recognised in various decisions, including in the cases of *Kolongei Farmers Co-operative Society Ltd vs Tom Kevolwe Anzingale & 6 others [2005]*



eKLR and Rhoda Mukuma vs John Abuoga [1988] eKLR. The powers of this Court in this respect include specifying the terms and extent of the status quo orders.

13. In this regard, 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. 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*.
14. The Applicants herein have referred the Court to their memorandum of appeal and the grounds of its appeal therein to demonstrate that it has an arguable appeal. The Applicants have in their grounds faulted the ELC on the application of the doctrine of res judicata, which we find arguable and ought to be canvassed fully. The Applicants' appeal is therefore not frivolous. The first limb of arguability has therefore been satisfied. On the nugatory aspect, it was stated by this Court in *Reliance Bank Limited vs Norlake Investments Ltd [2002] 1 E.A. 227*, that "the term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling." See also *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [supra]* wherein it was held, inter alia, that whether or not an appeal will be rendered nugatory depends on whether the status of the subject matter sought to be stayed is reversible; or if not reversible whether damages will be an adequate remedy for the party aggrieved.
15. It is notable that the 1st Respondent does not dispute that the Applicants are in occupation of the property which was the subject of the ruling in Malindi ELC Case No E063 of 2020**, namely Kilifi/Madzimbani/Mitangoni/835 and 841. In the circumstances it is our view that the appeal will be rendered nugatory, if the current status quo with regard to possession and the status of the title to the suit property is disturbed before the determination of the Applicants' appeal.
16. The 1st Respondents has urged that certain conditions be imposed if the orders sought are found to be merited. We are however of the opinion that we cannot impose the conditions sought for two reasons. Firstly, there is no monetary claim sought by, or awarded to the 1st Respondent against the Applicants in relation to the suit land; and secondly, the nature of some of the conditions sought require supervision by this Court, which is not possible. It is our view that justice will be better served for all parties in the circumstances of this application by the expeditious hearing and determination of the Applicants' appeal.
17. On the whole, we are satisfied that the Applicant's application has met the threshold for granting relief under Rule 5(2)(b) of the Court of Appeal Rules. We accordingly make orders as follows:
 - 1) An order be and is hereby granted preserving the status quo obtaining as at 4th March 2022 with regard to the physical possession and ownership of property known as Kilifi/Madzimbani/Mitangoni/835 and 841, pending the hearing and determination of the Applicants' intended appeal.
 - 2) The Applicants are directed to file and serve their Record of Appeal within forty-five (45) days of the date of this ruling.
 - 3) Upon default of order 2 hereinabove by the Applicants, the orders on the preservation of the status quo granted herein shall automatically lapse.
 - 4) The costs of the application dated 18th August 2021 to abide the outcome of the intended appeal.

DATED AND DELIVERED AT MOMBASA THIS 4TH 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

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

