



Dim Properties Limited v Lamu Breeze Investments Limited & 6 others (Civil Appeal (Application) E013 of 2021) [2022] KECA 498 (KLR) (1 April 2022) (Ruling)

Neutral citation: [2022] KECA 498 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E013 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
APRIL 1, 2022**

BETWEEN

DIM PROPERTIES LIMITED APPLICANT

AND

LAMU BREEZE INVESTMENTS LIMITED 1ST RESPONDENT

EQUITORIAL COMMERCIAL BANK LTD 2ND RESPONDENT

CHARLES MALAKWEN 3RD RESPONDENT

LUCAS CHIMERA KENGA 4TH RESPONDENT

SENIOR REGISTRAR OF TITLES 5TH RESPONDENT

COUNTY GOVERNMENT OF KILIFI 6TH RESPONDENT

ATTORNEY GENERAL 7TH RESPONDENT

((An application for stay of execution of the Decree in Environment & Land Court Case No. 224 of 2014 at Malindi (Olola, J.) issued on 22nd November 2019 pending the hearing and determination of the appeal herein))

RULING

1. In its application dated 15th December 2021 presented, principally, under Rule 5(2)(b) of the Court of Appeal Rules, Dim Properties Limited, the applicant/appellant, seeks an order for stay of execution of the decree issued by the Environment and Land Court at Malindi (Olola, J.) (ELC) on 22nd November 2019 in which that court, among other things, allowed the 1st and 2nd respondents suit and ordered the cancellation of the appellant's title LR No. 28462.



2. The background in brief is that in the suit before the ELC, the 1st and 2nd respondents, Lamu Breeze Investment and Equatorial Commercial Bank Ltd, asserted that the registration of Charles Malakwen and Lukas Chimera Kenga, the 3rd and 4th respondents herein, as proprietors of title CR 44095 consolidating plot numbers 10159 and 10160 North of Kilifi Township was fraudulent, illegal, null and void. The 1st and 2nd respondents sought declarations that the consolidation of the said plot numbers 10159 and 10160 was null and void. They also sought a declaration and cancellation of the title number LR. 28462 held by the appellant and purchased from the 3rd and 4th respondents.
3. In short, the 1st and 2nd respondents' case before the lower court was that the registration and certificate of title issued to the 3rd and 4th respondents and the transfer to the appellant was fraudulent and illegal. The appellant's case, on the other hand, is that it is an innocent purchaser for value having purchased the property from the 3rd and 4th respondents in 2008.
4. In his affidavit in support of the application as well as in his supplementary affidavit, Ashok Doshi, a director of the appellant deposed that although the impugned judgment was delivered in November 2019, the 1st and 2nd respondents have recently moved execute decree even before taxation of costs awarded to them; that the ELC allowed that request on the basis that it was unopposed, when in fact it was opposed. He deposes that unless the orders sought are granted, the appellant stands to suffer irreparable loss and harm; that the appeal will be rendered nugatory if the disputed property and the appellant's title is interfered with or if the present situation on the ground is changed by either demolitions taking place or fresh developments being undertaken.
5. In his written and oral submissions learned counsel for the appellant, Mr. Sanjeev Khagram, urged that the intended appeal is arguable as demonstrated in the memorandum of appeal already filed; that the parameters for the exercise of the Court's discretion as stated in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others* [2013] eKLR are met; that the 1st and 2nd respondents have obtained an order for execution before taxation; that should the 1st and 2nd respondents execute the decree and either sell or develop or demolish developments by the appellant on the property, the appeal will be rendered nugatory.
6. Learned counsel Mr. Ngonze holding brief for Mr. Gikandi for the 3rd and 4th respondents and learned counsel Ms. Jadi for the 5th respondents supported the application.
7. Ms. Jin Muzna, learned counsel holding brief for Mr. Munyithya for the 1st and 2nd respondents in opposing the application relied entirely on written submissions in which it is urged that present application is brought to delay the realization of the fruits of the judgment by the 1st and 2nd respondents; that the appellant's belated application for stay of execution of the judgment before the ELC was dismissed on 12th November 2021; that the 1st and 2nd respondents had attempted to enforce the decree by taking possession of the property but there was hostility from the appellant necessitating an application for assistance to be provided due to threat of violence. It was submitted that the appellant is not entitled to equitable relief as it has not approached the court with clean hands
8. It was submitted for the 1st and 2nd respondents that the twin principles for the exercise of discretion in favour of an applicant under Rule 5(2)(b) of the *Court of Appeal Rules* have not been met; that the decision of the ELC is well founded and there are no exceptional circumstances that would justify denying the 1st and 2nd respondents the fruits of their successful litigation. *Justus Kyalo Musyoka vs John Kivungo* [2019] eKLR are among the decisions cited.



9. Having reviewed the impugned judgment alongside the memorandum of appeal, we do not think the appeal is frivolous. There is for instance the question whether the ELC was right in rejecting the appellant's plea that it is a bona fide purchaser for value without notice whose interest in the property may thus be protected. Appreciating as we do that an arguable appeal is not one that must necessarily succeed, we are satisfied that the appeal is arguable.
10. As to whether the appeal will be rendered nugatory if we decline to grant the prayers sought and the appeal ultimately succeeds, it is evident that execution of the decree will entail cancellation of the appellant's title to the property. There is also the order in the decree directing the appellant to demolish a perimeter wall. We are satisfied that the appellant has demonstrated that the appeal will be rendered nugatory if we do not grant the orders sought.
11. We allow the application dated 15th December 2021 in terms of prayer 2 thereof and order a stay of execution of the decree in Malindi ELC Case No. 224 of 2014 between the parties hereto pending the hearing and determination of this appeal. Costs of the application will abide by the outcome of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 1ST DAY OF APRIL 2022.

S. GATEMBU KAIRU, FCIArb

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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 true copy of the original.

Signed

DEPUTY REGISTRAR

