



**Mwasambu & another (Suing as the Administrator of Mwasamu Jambo Mwasambu (Deceased))
v Kenga (Civil Application E048 of 2021) [2022] KECA 900 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KECA 900 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E048 OF 2021
P NYAMWEYA, SG KAIRU & JW LESSIT, JJA
MAY 13, 2022**

BETWEEN

OSCAR LULU MWASAMBU 1ST APPELLANT

ANDERSON MWARING MWASAMBU 2ND APPELLANT

**SUING AS THE ADMINISTRATOR OF MWASAMU JAMBO MWASAMBU
(DECEASED)**

AND

HARRISON DZENGO KENGA RESPONDENT

*(An Application for stay of execution of the judgment of the Environment and Land Court
at Malindi delivered on 21st February 2019 (Olola J.) in Malindi ELC Case No. 292 of 2016)*

RULING

1. The application before this Court is dated 28th May 2021, and is brought by the Applicants herein pursuant to Rule 5 (2) (b) of the Court of Appeal Rules, 2010. The Applicants are seeking an order of stay execution and /or injunction, restraining the Respondent and its employees, agents, servants or hirelings from execution of the judgment and orders in Malindi ELC Case No. 292 of 2016, and that the costs of and incidental to this application abide the outcome of the appeal. The application is supported by the affidavit sworn on 28th May 2021 by Oscar Lulu Mwasambu, the 1st Applicant herein.
2. The Applicants' case is that the judgment was entered in favour of the Respondent in Malindi ELC Case No. 292 of 2016, on 21st February 2019 dismissing the Applicants' suit. The Applicants being dissatisfied with the Court's decision filed an application for stay of execution, which was dismissed on 21st February 2016. The Applicants thereupon filed and served a Notice of Appeal dated 28th February 2019. The Applicants aver that the Respondent has begun the process of executing the impugned judgment and decree of the ELC, while his costs were yet to be taxed. Further, that the Chief Land



- Registrar, Kilifi County wrote to the Applicants to return the title deed so as to effect the order of the Court. The Applicants contend that the appeal would be rendered nugatory if the stay of execution orders/ injunction are not granted, and they would be forced to incur expenses to get another title deed should their appeal succeed.
3. Further, that the Respondent would not suffer any prejudice should the orders sought be granted, since he was in possession of and still used part of the land in dispute, though the title deed was in the Applicants father's name. The Applicants annexed copies of the Notice of Appeal dated 28th February 2019, the decree issued on 14th October 2020, a letter from the Ministry of Land & Physical Planning dated 14th April 2021, and of various letters to the Deputy Registrar, ELC, Malindi. Having lodged the Notice of Appeal within 14 days of the judgment 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 Respondent filed a replying affidavit he swore on 17th September 2021 in response. He avers that the application was not brought within reasonable time in view of the fact that the judgment and decree appealed against was delivered on 21st February 2019, and the initial application for stay of execution that was made by the Applicants in the High Court was dismissed on 13th May 2020, therefore the delay was inordinate and inexcusable. Further, that the dispute that gave rise to the impugned judgment related to rectification of the titles to the suit properties, one which was owned by the Applicants and the other owned by the Respondent, and the Applicants were only required to surrender the title deeds of the suit property in their possession for rectification, therefore the intended appeal would not be rendered nugatory if the stay of execution was not granted, and the rectification of titles effected by the Land Registrar.
 5. In the unlikely event that the intended appeal succeeded, that the Land Registrar would simply reverse without any substantial loss being suffered or any expense being occasioned to the Applicants. The Respondent further averred that he bought the suit property known as Land title No. Kilifi/ Ngereny/1013 in 1989 and had been in occupation since, while the Applicants were in occupation of Land title no Kilifi/ Ngereny/1012. Additionally, the judgment and decree appealed against did not call for the eviction of the Applicant and there was nothing detrimental that could result if, the stay of execution was not granted. In conclusion, the Respondent stated that the intended Appeal did not raise any arguable issues for the Court's determination and the Respondent being the successful party in the primary suit, was entitled to enjoy the fruits of the judgment and decree without undue delay.
 6. When the matter came up for hearing on 22nd February 2022, Mr. Odhiambo, learned counsel for the Applicants, and Mr. Shujaa, learned Counsel for the Respondent were present. Both counsel relied on the written submissions dated 28th January 2022 and dated 17th February 2022 respectively that they lodged in this Court, and Mr. Odhiambo informed us that the current status is that the Applicants have the title to the property that is the subject of the appeal, while the Respondent has possession.
 7. 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*. In addition, in the case of *Clerk, Nairobi County Assembly vs Speaker, Nairobi City County Assembly & another [2021] eKLR* this Court held that injunctive orders can be granted even where the judgment appealed against simply dismissed the applicant's claim.



8. On the limb of arguability, the Applicants submitted that the issue as to the acreage/size and number of plot allegedly sold by the Applicants' father to the Respondent was an arguable issue. Further, the issue as to which particular plot the Land Control Board gave consent to for subdivision and sale was also an arguable point. On the nugatory limb, the Applicants submitted that the Respondent was likely to deal with the suit plot in a way which was prejudicial to the Applicants, that is, he may sell the suit plot rendering the appeal nugatory in the event that the Applicants succeed in the appeal. Further, that the Applicants would have no cause of action against any third party who may purchase the suit plot or a portion of the same from the Respondent. Additionally, the Respondent would not be prejudiced should the Court grant the orders prayed for since the Respondent was in possession, occupation and use of the said plot.
9. The Respondent detailed the facts giving rise to this appeal, and submitted that the Applicants had not demonstrated that the appeal was arguable, since they had not exhibited a draft memorandum of appeal showing the grounds relied on. In addition, that the supporting Affidavit did not contain any averments on the matters of law and facts on which the Applicants contend the learned trial Judge erred in. On the second limb of the appeal being rendered nugatory, the Respondent submitted that that the execution of the judgment would not irreparably affect the substratum of the appeal because the titles sought to be rectified had already been registered pursuant to execution by the Respondent.
10. Further, that each party had been in physical possession of their respective parcels of land before the institution of the suit, and the rectification would not result in the eviction of the Applicants from the parcel of land, and in the event that the appeal succeeds, the rectification can simply be reversed by an order of the Court. Therefore, that the averment that the Applicants would be required to incur expenses in order to get another title deed in the event the appeal succeeded was mischievous. Lastly, it was the Respondent's argument that there had been inordinate delay by the Applicants in bringing the application, as it was filed on 21st June 2021, one year from the date of dismissal of the first application for stay made by the Applicants on 13th May 2020. Therefore, that the Applicant was guilty of laches and did not deserve the exercise of the discretion.
11. The brief facts giving rise to the instant application are that the Applicants are administrators of the estate of the deceased Masumbuko Jambo Mwasambu, who was the initial plaintiff in the ELC, and was aggrieved with and sued the Respondent challenging his occupation and possession of the land Plot No. Kilifi/Ngerenya/868, as well as his lodgement of a caution on the title to the suit land. The Respondent in his defence and counterclaim maintained that he purchased 6 acres out of the suit land vide agreement dated 23rd October 1993 and sought a declaration to this effect and rectification of title.
12. The ELC noted that there was a land control board consent that was to the effect that 6 out of the 12 acres of the suit land was being transferred to the Respondent, and was satisfied that there was evidence that he purchased the suit land. The trial Judge therefore dismissed the deceased's suit and allowed the Respondent's counterclaim, and ordered the deceased to surrender to the Kilifi District Land Registrar the Title Deeds for Plot No. Kilifi/Ngerenya 868 and for Plot No. Kilifi/Ngerenya/1012 for purposes of rectification.
13. We note that the Applicants have not pleaded what aspects of the impugned judgment they are aggrieved with, nor availed a draft memorandum of appeal, and have instead focused on the prejudice they are likely to suffer if a stay of execution of the judgment is not granted. We are also mindful that this Court observed in the case of *Somak Travels Ltd v Gladys Aganyo* [2016] eKLR that while it is desirable for the applicant to annex a draft proposed memorandum of appeal to its application, the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application, which was the case in that application.



14. In the instant application, it was pointed out by the Respondent that the application and its supporting affidavit does not indicate any arguable grounds of appeal. In the applicants submissions however it is contended that the Applicants are aggrieved by the findings of the ELC on the subject land that was the alleged purchase by the Respondent, which in our view is not a frivolous ground. On the second limb of the appeal being rendered nugatory, the Applicants do not dispute that the Respondent is in occupation of the suit land. It is our view that any prejudice the Applicants may suffer by the Respondent disposing of the suit land or reversion of title in the event that their appeal succeeds can be adequately addressed by way of damages. We therefore find that the threshold for the grant of a stay of execution has not been met, as both limbs need to be demonstrated.
15. We consequently dismiss the Applicants' Notice of Motion dated 28th May 2021 with costs to the Respondent.
16. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MAY 2022.

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

