



**Murage v Soft White Beach Limited & 5 others (Civil Application
E010 of 2020) [2022] KECA 527 (KLR) (6 May 2022) (Ruling)**

Neutral citation: [2022] KECA 527 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E010 OF 2020
P NYAMWEYA, JA
MAY 6, 2022**

BETWEEN

**JOSEPH NICHOLAS MURAGE (AS THE ADMINISTRATOR OF THE ESTATE
OF BERNARD CHIORI MURAGE) APPLICANT**

AND

**SOFT WHITE BEACH LIMITED 1ST RESPONDENT
JOSEPH KASHURU MUMBO 2ND RESPONDENT
MASUMBUKO YERRY KOMBE 3RD RESPONDENT
THE HON. ATTORNEY GENERAL 4TH RESPONDENT
THE CHIEF LAND REGISTRAR 5TH RESPONDENT
THE DISTRICT LAND REGISTRAR, KILIFI 6TH RESPONDENT**

(Application for settlement of the terms of a draft order arising from the Ruling delivered herein on 29th January 2021 (W. Karanja, P.O Kiage and K. M'Inoti JJA)

RULING

1. The application before me is for the settlement of the terms of the draft order dated 29th January 2021 extracted by the Applicant, arising from the ruling of this Court delivered on 29th January 2021. When the draft order was placed before me on 2nd March 2022 by Mr. Juma, the learned counsel for the Applicant who relied on submissions dated 14th February 2022. In which he submitted served the draft order on the Respondents via email on 2nd February 2021 at 11:44 a.m. in line with Rules 33 and 34 of the Court of Appeal Rules and there is an affidavit of service dated 12th February 2022 confirming service on all Respondents. However, that none of the Respondents objected to the said draft order as extracted and or responded to the Applicant's service within the seven (7) days provided for under the Court of Appeal Rules (or at all to date) which led to the application for settlement of terms currently



before this Court. The counsel therefore urged this Court to settle and or adopt the draft extracted order presented by the Applicant as the final order of this Court, pursuant to the ruling delivered on 29th January 2021.

2. Mr Kokobe, the learned counsel for the 2nd and 3rd Respondents opposed the settling of terms on the grounds that the terms of the order sought to be settled are pending review, as there is an application dated 29th January 2021 filed by the 2nd and 3rd Respondents seeking to stay, review and set aside the said orders. The counsel pleaded with the Court to suspend the settlement of terms until such time as their application for review is heard, and that the said application can be listed alongside the main appeal for hearing.
3. Mr. Juma in reply pointed out that the said application for review was not certified urgent nor directions given as to its hearing, while the main appeal was scheduled for hearing on 23rd March 2021 and parties had already filed submissions thereon.
4. I have considered the counsel's respective arguments. Rule 34 (2) (d) of the [Court of Appeal Rules of 2010](#) provides that if the parties do not agree on the form of an order or where there is no approval of a draft order prepared by a successful party by the other party, the order may be settled by a single Judge of this Court. The ruling giving rise to the draft orders appeal was delivered by Hon, W. Karanja, P.O Kiage and K. M'Inoti JJA, who are now posted out of this station, hence the placing of the application for settlement of the terms before this Court.
5. The learned Judges of Appeal allowed an application filed by the Applicant in a Notice of Motion Notice dated 26th October 2020 in his favour on the following terms:-

“For these reasons we are satisfied that the applicant as demonstrated both limbs on arguability and the nugatory aspect . This application succeeds. We allow it and grant prayers 4 , 5 and 6 of the application with costs in the intended appeal.”

6. Prayers 4, 5 and 6 of the application read as follows:

“ 4.. Pending the hearing and final determination of the Application herein the Honourable Court be pleased to issue an order restraining the 1st to 3rd Respondents, their servants, agents and or employees and or anyone else claiming rights or ownership under either of them from selling, marketing/ advertising for sale, disturbing, trespassing, alienating, claiming ownership and or interfering with the Applicant's quiet possession, peaceful enjoyment and or ownership of the parcel of land known and registered as Land Reference Number Chembe/ Kibabamshe/ 393 or any part thereof;

5. Pending the hearing and final determination of the intended Appeal by the Applicant against the Judgement delivered on 13th May 2020 by Hon. Olola J. in Malindi High Court case no. ELC No. 30 of 2011, the Honourable Court be pleased to issue an order restraining the 1st to 3rd Respondents, their servants, agents and or employees and or anyone else claiming rights or ownership under either of them from selling, marketing/ advertising for sale, disturbing, trespassing, alienating, claiming ownership and or interfering with the Applicant's quiet possession, peaceful enjoyment and or ownership of the parcel of land known and registered as Land Reference Number Chembe/ Kibabamshe/393 or any part thereof;

6. That the Honourable Court be pleased to issue an order staying the execution of the Judgment dated, staying the execution of the Judgment dated 13th May 2020 and the Decree arising therefrom issued in ELC Case No. 30 of 2011 as consolidated with HCCC



Case No. 22 of 2011 by the High Court at Malindi, pending the hearing and final determination of the intended Appeal by the Applicant against the Judgement delivered on 13th May 2020 by Hon. Olola J. in Malindi High Court case no. ELC No. 30 of 2011..”.

7. I have perused the draft order prepared by counsel for the Applicant, and the draft orders as drawn are clear and reproduce the wording of the said prayers, therefore accurately reflecting the decision of this Court. My view on the 2nd and 3rd Respondents’ pending application for review and setting aside of the orders is that the pending application has no effect whatsoever on the said orders granted on 29th January 2021, which remain valid and binding on the parties against whom they are issued, unless and until they are stayed, varied or set aside by further orders given by a court of competent jurisdiction. In that event, the successful party or parties will have the opportunity to draft the appropriate orders for approval.
8. In the circumstances, the draft orders dated 29th January 2021 extracted by the Applicant herein are accordingly approved as drawn. There shall be no order as to the costs of this application.
9. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MAY 2022.

P. NYAMWEYA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

