



REPUBLIC OF KENYA



**Morijo-Loita Residents Association & 558 others v Narok South Land
Adjudication & Settlement Officer & 2 others (Civil Application
184 of 2022) [2022] KECA 1143 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1143 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 184 OF 2022
K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA
OCTOBER 21, 2022**

BETWEEN

MORIJO-LOITA RESIDENTS ASSOCIATION 1ST APPLICANT
SHADRACK KIOK 2ND APPLICANT
JACKSON MANCHA 3RD APPLICANT
TAIKO OLE NTIBANY 4TH APPLICANT
ALEX OLE KULUO 5TH APPLICANT
JULIUS TUARARI 6TH APPLICANT
SEKEKO SUMPATI 7TH APPLICANT
TAMPUA KISAIKA 8TH APPLICANT
NTASIKOI OLARUSAI 9TH APPLICANT
NOLTERITOI ENOLE NKUUUNA 10TH APPLICANT
OLOKULA OLOLOSO 11TH APPLICANT
DAVIS LESHAN OLOLOOTORONKEN & 547 OTHERS 12TH APPLICANT

AND

**NAROK SOUTH LAND ADJUDICATION & SETTLEMENT
OFFICER 1ST RESPONDENT**
**CHAIRPERSON MORIJO-LOITA LAND ADJUDICATION COMMITTEE 2ND
RESPONDENT**
ATTORNEY GENERAL 3RD RESPONDENT



(Being an application for injunction and stay of execution against the Ruling and Order of the Environment and Land Court at Narok (C. G. Mbogo, J) dated 30th March, 2022 and delivered on 27th April, 2022 in E.L.C Petition No. E002 of 2021)

RULING

1. The applicants' claim is that they are lawful residents of Morijo-Loita Adjudication Section, which was declared for adjudication vide Gazette Notice dated October 26, 2011. Though actively engaged in the ongoing process of adjudication, the applicants (Morijo-Loita Residents Association and 558 individuals) were dissatisfied with the manner in which the adjudication was being undertaken.
2. Their grievances led to judicial intervention in Constitutional Petition No 11 of 2011, which later became Petition No 16 of 2017 in the Environment and Land Court (ELC) in Narok. However, the identity of the petitioners/applicants is not disclosed in the record. Consequently, the adjudication process was temporarily suspended by an order of the court in its judgment delivered on October 2, 2019, but which is not contained in the record before us.
3. By a letter dated November 25, 2020 addressed to the 1st respondent, the applicants sought to assert their constitutional right of access to information by demanding "... the information, documents and the position" relating to:
 - i. The adjudication by-laws and any amendments thereto in respect of Morijo-Loita adjudication section.
 - ii. Minutes of the meetings at which the adjudication by-laws and any amendments thereto were discussed and approved by members of the adjudication section.
 - iii. Notices calling for meetings of members of the adjudication section to discuss the terms of the adjudication by-laws and any amendments thereto.
 - iv. The gazetted map of Morijo-Loita adjudication section showing the proper boundaries of the section and total size of land available within the section for purposes of the adjudication process.
 - v. A written confirmation of the total acreage of land within the Mirojo-Loita adjudication section and showing what portion of the total acreage is within Loita forest.
 - vi. Minutes of meeting showing discussions regarding the manner in which the part of Loita forest which shall fall within the adjudication section will be owned and/ or handled pursuant to the adjudication process.
 - vii. Register of members/landowners of the adjudication section.
 - viii. Minutes of the meeting of the community at which the issue of appointment of members of the 2nd respondent was discussed and agreed upon.
 - ix. Spatial plan prepared to govern the adjudication process in the adjudication section."



4. The letter was written by M/s Oyomba Mosota and Wamwea (Advocates) on instructions from, and on behalf of, 800 residents of the Loita Enkidong and Purko communities along with members of the Orkinyil Welfare Association, all of whom were said to be residents of the Morijo-Loita Adjudication Section. Its tone and effect is, in our view, an attempt by the 1st applicant to play the role of overseer or supervisor of the adjudication for and on behalf of its members.
5. In furtherance of their demand, the applicants filed in the ELC at Narok Petition No E002 of 2021 seeking judicial intervention in the enforcement of their constitutional right of access to information relating to the ongoing land adjudication. They prayed, inter alia, for an order compelling the respondents to supply to them the documents enumerated in their Motion. However, the record before us does not contain a copy of the Petition to enable us ascertain the exact nature and extent of the prayers sought in the substantive reference.
6. Along with the Petition, the applicants filed a notice of motion dated February 24, 2021 under Articles 20, 21, 22 and 23 of the *Constitution*, Rules 19, 23 and 24 of the *Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013* seeking, inter alia: an order directing and/or compelling the respondents to supply the applicants herein with certified copies of the above-listed documents; conservatory orders restraining the respondents from proceeding with the adjudication process in Morijo-Loita Adjudication Section pending determination of the petition; a conservatory order restraining the respondents from withdrawing any monies from, or in any manner transacting on bank account No 01141987843100 held at the Co- operative Bank, Narok Branch, to which the applicants contribute moneys intended for the adjudication process, pending hearing and determination of the petition; and costs of the application.
7. The Motion was supported by the annexed affidavit of Shadrack Kiok (the 2nd applicant and a director of the 1st applicant) sworn on February 24, 2021. According to the 2nd applicant, the land adjudication process commenced sometime in 2019 when the 1st respondent (Narok South Land Adjudication and Settlement Officer) operationalised the 2nd respondent (Morijo-Loita Land Adjudication Committee) and appointed members of the committee; that the 2nd respondent formulated certain by-laws to guide the adjudication; that the by-laws were formulated without public participation; that the applicants' request for copies of the by-laws vide their advocates' letters dated 20th July and August 14, 2020 were not met by the respondents; that subsequent reminders vide their letters dated 21st October and November 25, 2020 did not elicit positive response; that the respondents persist in their refusal to publish the names of the individuals listed in the adjudication register; that some of the applicants' names have been excluded from the register; that the appointment of the Adjudication Committee violates the constitutional principles of inclusion and gender parity; and that the respondents' conduct is in breach of the applicants' fundamental rights and freedoms.
8. The respondents opposed the applicants' motion and, in reply vide his affidavit sworn on March 17, 2021, the 2nd respondent (Malano Sarguran) deponed that the 2nd applicant's supporting affidavit is contradicted in material particulars by affidavits sworn by other applicants; that the by-laws in issue were formulated in a transparent and fair manner; that public participation meetings were conducted in different villages before adoption; that the applicants have free access of all the documents in issue subject, however, to formal request addressed to the respective custodians; that access to such information has never been in issue in view of the fact that the applicants have at all times been at liberty to freely access the documents at the land adjudication office; that the members' register is at all times available for inspection by the public; that the appointment of the 2nd respondent and the Land Adjudication Committee was subjected to public participation forums in the 24 villages in Morijo; that the preservation of Loita forest for cultural and religious practices has been conclusively addressed



in those public forums; and that the applicants have failed, refused or neglected to subject themselves to the statutory dispute resolution mechanisms prescribed in the [Land Adjudication Act](#).

9. In further reply, the 1st respondent (Josephine N Njoroge) filed her affidavit sworn on May 7, 2021 on her own behalf and on behalf of the 3rd respondent. According to her, the adjudication section in issue was lawfully and procedurally declared vide the notice dated October 26, 2011; that the process of adjudication stalled following an order of injunction issued in previous proceedings, but resumed following the judgment and order given on October 2, 2019; that, thereafter, the adjudication Committee was duly appointed following public participation in 24 villages, which were represented in the process; that the issue of gender balance was resolved by appointment of 5 women to the Committee; that there is no spatial plan in existence to govern the adjudication process, but neither is it a requirement under the Act; that by-laws were formulated to guide the Committee in compiling the list of landowners in view of the fact that none of them were at the time in occupation of the land subject to adjudication; that the boundaries of the Loita forest are yet to be established during the demarcation process; that it is only after demarcation of the public and community land available for adjudication that it can be subdivided and allocated to individual residents; that the register of members was compiled in consultation with representatives of the 24 villages in the adjudication section; that the list was opened for inspection for a period of 14 days in a meeting held on February 17, 2021 at Moriyo Trading Centre; that 255 cases (objections) were filed with the committee, but the *status quo* was maintained and the objections held in abeyance pending hearing and determination of the applicants' Motion; that any members excluded from the register will have the opportunity to present their case at the hearings before the committee; that the applicants are unwilling to submit to statute law governing land adjudication; that the respondents are not by any means in breach of the applicants' constitutional rights and freedoms as alleged; and that continued delay in the adjudication process will unduly prejudice more than 6,000 members of the community.
10. In its Ruling dated 30th March 2022 and delivered on April 27, 2022, the ELC at Narok (CG Mbogo, J) dismissed the applicants' Motion. According to the learned Judge, the application was premature for the reasons that the applicants had failed to exhaust the dispute resolution mechanism prescribed by the [Land Adjudication Act](#).
11. Dissatisfied by the Ruling and Orders of the ELC, the applicants preferred an appeal on 11 grounds set out in their Memorandum of Appeal dated May 27, 2022 most of which are argumentative, but which we take liberty to summarise and reframe as hereunder. According to them, the learned Judge erred in fact and in law in, inter alia: failing to exercise his judicial discretion with the overall objective of ensuring that the ends of justice are met; finding and holding that the respondents had provided the applicants with access to the information and documents sought to enforce their constitutional rights under Article 35 of the [Constitution](#); finding that the issue of public participation could not be considered in an application for interlocutory injunction and/or conservatory orders; finding and holding that the existence of a statutory dispute resolution mechanism intended to address the merits or substance of complaints in an adjudication process disqualified the applicants from filing a constitutional petition for relief aimed at protecting their constitutional rights and fundamental freedoms in the adjudication process; finding and holding that the applicants had not submitted the dispute and complaints to the 1st respondent despite several correspondence on record demonstrating that they did so, but to no avail; finding and holding that the applicants ought to have submitted their disputes to the 1st respondent for determination while the 1st respondent is a party to the dispute; and in disregarding the need to preserve the subject matter of the dispute pending the hearing and determination of the substantive petition. They contend that the learned Judge erred in exercise of his discretion thereby occasioning injustice.



12. In their Notice of Motion dated May 27, 2022, the applicants seek, among others: an order to stay execution of the Ruling and Order of the ELC delivered on April 27, 2022 pending the hearing and determination of the intended appeal; an order of injunction restraining the respondents by themselves, agents, employees, members or otherwise, howsoever from proceeding with the land adjudication process aforesaid pending the hearing and determination of the intended appeal; a mandatory injunction to compel the respondents to supply the applicants with certified copies of the documents listed above; stay of proceedings in Narok ELC Petition No E002 of 2021 pending the hearing and determination of the intended appeal; and that costs of their application do abide in the outcome of the intended appeal.
13. The applicants' Motion is opposed as is evident from the 2nd respondent's replying affidavit sworn on June 9, 2022 and his written submissions dated June 9, 2022, and those of the 1st and 3rd respondents' dated August 3, 2022 in reply to the applicants' written submissions dated June 7, 2022 filed in support of the Motion before us.
14. In reply to the applicants' Motion and submissions filed in support thereof, the respondents essentially contend that the applicants have not disclosed an arguable appeal and, accordingly, do not merit the orders sought.
15. Having considered the Applicant's Notice of Motion dated May 27, 2022, the affidavit in support thereof, the draft Memorandum of Appeal annexed thereto, the written and oral submissions of the learned counsel for the applicants and those of the learned counsel for the respondents, we form the considered view that the applicants' Motion stands or falls on two main grounds: whether the appeal is arguable, which is to say that it is not frivolous; and whether the appeal, if successful, would be rendered nugatory if stay of proceedings in the ELC and the injunctive relief hereby sought were not granted.
16. The principles that apply in applications under Rule 5(2)
 - (b) of the Court of Appeal Rules for stay of execution or of further proceedings, or for injunctive relief pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings in the impugned judgment, decree or order were not stayed. The applicant must satisfy both principles, it will not suffice to satisfy only one.
17. These principles were enunciated in, among others, the following judicial pronouncements of this Court, including those cited by the parties, and to which we now turn. On the first limb of this twin principle, this Court held in *Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC* [2020] eKLR that, for stay orders to issue in similar cases, the applicants must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory (see also *Kenya Tea Growers Association and Another v Kenya Planters Agricultural Workers Union* [2012] eKLR; and *Ahmed Musa Ismail v Kumba Ole Ntamorua and 4 Others* [2014] eKLR).
18. As regards the sufficiency of the pleaded grounds of appeal to warrant a grant of the stay orders sought, this Court in *Yellow Horse Inns Limited v A. A. Kawir Transporters & 4 Others* [2014] eKLR observed that an applicant need not show a multiplicity of arguable points, as one arguable point would suffice. Neither is the applicant required to show that the arguable point will succeed.
19. That brings us to the second limb of the twin principle – whether the appeal, if successful, would be rendered nugatory in the event that the orders sought are not granted. The term “nugatory” was



defined in *Reliance Bank Ltd v Norlake Investments Ltd* (2002) 1 EA p.227 at p.232 thus: “it does not only mean worthless, futile or invalid. It also means trifling.”

20. The Court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. On our reading of the grounds on which the applicant’s Motion is founded, the affidavit in support thereof, and of the respective written and oral submissions of the learned counsel for the parties, we draw the conclusion that the applicants’ grievance revolves around, among other contested issues, the alleged breach of their constitutional right of access to information relating to the ongoing land adjudication; the alleged exclusion of public participation in the appointment of the Adjudication Committee; and the alleged refusal, failure or neglect on the applicants’ part to submit to the statutory dispute resolution mechanism prescribed under the *Land Adjudication Act*, only to mention a few.
21. In the circumstances, we are persuaded that the grounds of appeal set out in the draft Memorandum of Appeal are arguable. We are of the view that they are not idle, and that satisfies the first limb of the twin principle for grant of orders under Rule 5(2) (b) of this Court’s Rules subject, however, to satisfaction of the second limb of this principle
 - whether the appeal, if successful, would be rendered nugatory in the event that the orders for stay, and the injunctive relief sought, are not granted.
22. The applicants’ Motion fails in so far as it seeks stay of execution of the Ruling and Order of the ELC delivered on April 27, 2022 by which the court dismissed an application for: a mandatory injunction to compel the respondents to supply the applicants with the documents mentioned above; conservatory orders restraining the respondents from proceeding with the adjudication process; and a conservatory order restraining the respondents from withdrawing any monies from, and from transacting on the adjudication bank account.
23. The fact that this Court cannot stay negative orders need not be overemphasised. The Court of Appeal in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR held that:

“Following that approach of looking at the nature of the orders even before delving into the said principles in a Rule 5(2) (b) application the Court has identified negative orders as orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order. That was the position in *Executive Estates Limited v Kenya Posts & Anor.* [2005] 1 E.A. 53 where it was stated that “... The order which dismissed the suit was a negative order which is not capable of execution...”
24. The only other question for our consideration is whether the applicants merit injunctive relief to restrain the respondents from carrying on with the ongoing adjudication merely on the contested allegation that they (the respondents) have failed to facilitate access to certain documents and information sought by the applicants in exercise of their constitutional right of access to information.
25. To our mind, a clear distinction must be drawn between the applicants’ constitutional right of access to information as guaranteed under Article 35, which they have every right to assert, and their individual rights and obligations under the *Land Adjudication Act*. In his submissions, learned counsel for the applicants told the Court that the applicants were seeking to enforce their constitutional rights, but without prejudice to their individually submitting to the ongoing adjudication. In his words, the applicants were pursuing both processes. Why then restrain the respondents from carrying out the adjudication process? That is the question none of the applicants have answered. Moreover, denial of the injunctive relief sought would by no means render the intended appeal nugatory.



- 26. The term “nugatory” was defined in *Reliance Bank Ltd v Norlake Investments Ltd* (2002) 1 EA p.227 at p.232 thus: “it does not only mean worthless, futile or invalid. It also means trifling.” In our considered view, this Court’s decision not to grant the injunctive relief and stay of the impugned Ruling pending determination of the intended appeal would not in any way render the appeal futile or worthless. Simply put, the intended appeal would not be rendered nugatory in the absence of the injunctive relief or stay as sought.
- 27. The Court in *Reliance Bank Ltd v Norlake Investments Ltd* (ibid) also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. We are persuaded that the circumstances of the case before us does not call for temporary orders restraining the respondents from carrying out land adjudication in the Morijo-Loita section. Indeed, it is in the public interest that land adjudication in the section be undertaken to its logical conclusion.
- 28. According to *Black’s Law Dictionary, 10th Edition*, “public interest” is defined as –
 - “The general welfare of the public that warrants recognition and protection; or something in which the public as a whole has a stake especially an interest that justifies governmental regulation.”
- 29. In *Kenya Anti-Corruption Commission v Deepak Chamanlal Kamni and 4 others* [2014] eKLR, this Court held that -
 - “...a matter of public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large.”
- 30. In view of the foregoing, we reach the inescapable conclusion that the applicants have failed to satisfy the second limb of the principle for grant of the interlocutory injunctive relief sought pursuant to rule 5(2) (b) of this Court’s Rules. Accordingly, the applicants’ notice of motion dated May 27, 2022 is hereby dismissed with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

K. M’INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

