



REPUBLIC OF KENYA



**KENYA LAW**  
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**Shee & 2 others v Ahmed & another (Civil Application 50 of 2021)  
[2022] KECA 1282 (KLR) (18 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1282 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION 50 OF 2021  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
NOVEMBER 18, 2022**

**BETWEEN**

**SAID LALI SHEE A.K.A POTO MARIAM LALI SHEE ..... 1<sup>ST</sup> APPLICANT**

**AZIZ LALI SHEE ..... 2<sup>ND</sup> APPLICANT**

**RUKIYA LALI SHEE ..... 3<sup>RD</sup> APPLICANT**

**AND**

**MOHAMED YAHYA AHMED ..... 1<sup>ST</sup> RESPONDENT**

**HAZMI HAMID AHMED ..... 2<sup>ND</sup> RESPONDENT**

*(An application for orders of injunction against the judgment of the Environment and Land Court at Malindi delivered by Olola, J. on 15th October, 2020 in ELC Case No. 118 of 2014)*

**RULING**

1. The applicants Said Lali Shee aka Poto, Mariam Lali Shee, Aziz Lali Shee and Rukiya Lali Shee, in their application dated July 13, 2021, brought pursuant to rule 5 (2) (b) of the [Court of Appeal Rules](#) (Rules) seek:

That an injunction be issued restraining the respondents herein by themselves, agents, employees or anyone claiming interest through them from disposing, carrying out subdivisions, alienating, leasing, sub-leasing, charging, transferring and/or wasting the suit property being parcel of land known as Lamu/Hindi/ Magogoni/526 pending the hearing and determination of the applicants' appeal.

2. The applicants' grounds for seeking the injunctive relief are that their suit in the ELC was dismissed and that being desirous to pursue an appeal to this court they had lodged a notice of appeal. They contend that the respondents are moving very fast to dispose the suit property by having the caution



- that had been placed over the suit property removed. That it would be reasonable to preserve the suit property by an order of injunction.
3. The brief facts of the case is that the applicants instituted a suit against the respondent claiming interest in part of the suit property. The applicants' contention was that the 1<sup>st</sup> respondent misused his influence as a leader in the area during the adjudication process to fraudulently include the applicants' portion of land into his own and allocated himself 13.5 ha of the suit land. In their submissions, the applicants contended that the purpose of the injunctive orders is to preserve the substratum of the intended appeal from the unlawful sale and transfer of the suit property from the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent despite their admission that the applicants' property was amalgamated into their property. The 1<sup>st</sup> respondent accused the applicants of filing the said suit 26 years after the event in a bid to benefit a second time following the introduction in the area of the Lamu Port Project [LAPPSET]. Their suit was dismissed, and thus this application.
  4. When this application was called out for virtual hearing on the October 5, 2022, Learned Counsel Mr Otara for the applicants and learned counsel Mr Onyancha for the respondents were present. Both counsel relied on their written submissions and did not wish to highlight them. From the record, the applicants written submissions are dated February 17, 2022. The respondents filed a replying affidavit sworn by 2<sup>nd</sup> respondent dated March 8, 2022. Their written submissions are of even date. They oppose the application on the grounds, one the application has been filed late and secondly, for reason the applicants were compensated for the three acres that belonged to them that had been absorbed into the suit property.
  5. We have considered the application, the affidavits sworn for and against the application together with the submissions of counsel to the parties. The principles applicable in the exercise of this court's discretion under rule 5(2) (b) of the [Rules](#) 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 v Tony Ketter & 5 others](#) [2013] eKLR.
  6. On the first principle of arguability of the intended appeal, the applicants have urged that this court's jurisdiction to stay judgment is contingent on a notice of appeal having been filed against the said judgment within 14 days of the date of its delivery, pursuant to the then rule 75 of the [Court of Appeal Rules of 2010](#) (now rule 77 of the [2022 Rules](#)). This requirement is prescribed by rule 5 (2) (b) and was confirmed by this court in [Halai & another v Thornton & Turpin \[1963\] Ltd](#) [1990] KLR 365. Mr Otara for the applicants urged that the appeal is arguable as one of the grounds that will be raised on appeal will be that the learned judge erred by failing to appreciate that the respondents admitted that the applicants land was absorbed into the respondents land, and that there was no transaction in writing between the applicants and the respondents to prove that the applicants were compensated for their land as the respondent claimed.
  7. In their response, in both the replying affidavit and the written submissions the respondents oppose the application for orders of injunction on grounds that the application was filed after 9 months from the date of delivery of judgment which period was inordinate and the same has not been explained by the applicants. Further that the same is frivolous and vexation since the claim since the cause of action arose on February 22, 1996, and the suit was brought 18 years later contrary to section 7 of the [Limitation of Actions Act](#). It was further submitted that no appeal lies before the court as the applicants' are yet to file and serve their record of appeal. It was further submitted that the grounds raised in application are baseless and that the respondents acted within the law when they removed the applicants' caution.



That the application and the intended appeal have the remotest chance of success and that granting the orders sought will only prejudice the interest of the respondents' from enjoying the fruits of their judgment.

8. Beginning with the issue of competence of this appeal as raised by the respondent's counsel: This court's jurisdiction to stay judgment is contingent on a notice of appeal having been filed against the said judgment within 14 days of the date of its delivery, pursuant to the then rule 75 of the *Court of Appeal Rules of 2010* (now rule 77 of the *2022 Rules*). This requirement is prescribed by rule 5 (2) (b) of the *Rules* as follows:

(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may—

a. ...;

b. in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.

[See also *Halai & another v Thornton & Turpin (1963) Ltd* [1990] KLR 365.]

9. We have noted that the applicants lodged a notice of appeal on October 29, 2020, which meets the requirement of rule 5 (2) (b). The respondents' argument that there is no appeal filed is in the circumstances not accurate. As for whether the applicants have demonstrated an arguable ground, the issue raised by the respondents as to when the cause of action arose is an arguable issue; the issue whether the alleged compensation of the applicants was proved and whether it was documented, is also an arguable issue. We are satisfied that the applicants have therefore demonstrated an arguable appeal.

10. As to whether the appeal will be rendered nugatory if the order sought is not granted and the appeal were to succeed: we are aware that the subject matter is land. If the order sought is not granted and the land changes hands and the appeal succeeds, the appeal will be rendered nugatory as it may be out of the reach of the applicants. This is one case where it is imperative to preserve the subject matter of the appeal and therefore the substratum of the appeal.

11. Having carefully considered this application we are satisfied that the applicant has satisfied the twin principles for grant of the orders sought. In the result, we make the following orders:

- i. The application dated July 13, 2021 is granted in terms of prayer 2;
- ii. That an injunction be issued restraining the respondents herein by themselves, agents, employees or anyone claiming interest through them from disposing, carrying out subdivisions, alienating, leasing, sub-leasing, charging, transferring and/or wasting the suit property being parcel of land known as Lamu/Hindi/ Magogoni/526 pending the hearing and determination of the applicants' appeal.
- iii. The applicants shall file a competent appeal within 45 days from the date of this ruling, and in default the injunction granted herein shall stand discharged.
- iv. Thereafter dates for the hearing of the appeal be fixed at the registry.
- v. The costs of the application shall abide the outcome of the appeal.

Those are our orders.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF NOVEMBER 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 a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

